TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 117.

GEORGE W. CROSSMAN AND HERMAN SIEBRECHT, COMPOSING THE FIRM OF W. H. CROSSMAN & BROTHER, PLAINTIFFS IN ERROR,

vs.

THEODOR G. LURMAN AND BENJAMIN D. WILLIAMS, COMPOSING THE FIRM OF THEODOR G. LURMAN & COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

FILED AUGUST 14, 1903.

(18,048.)

(18,648.)

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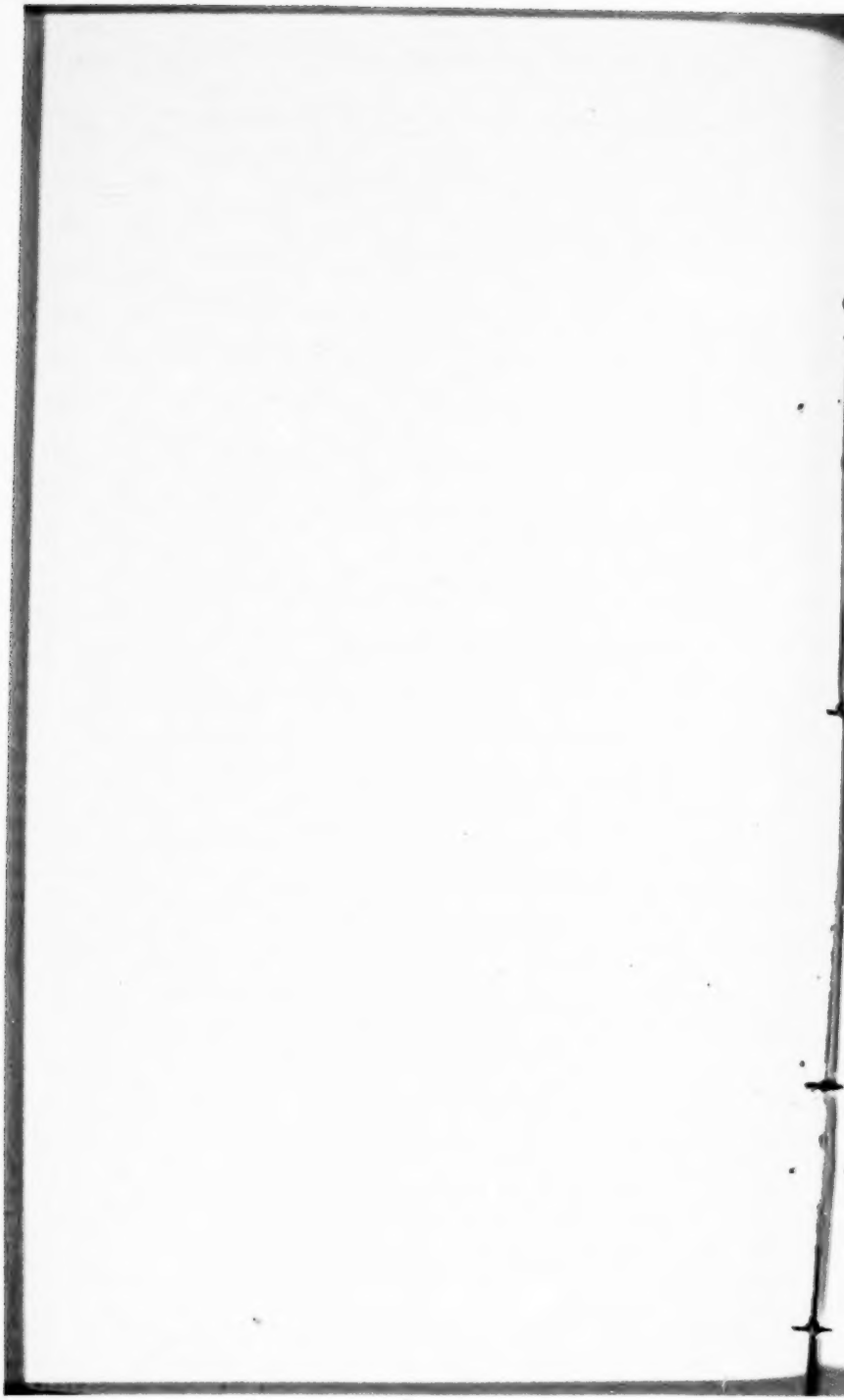

a No. 387.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye, that we having examined the records and files in the office of the clerk of the county of New York and clerk of the supreme court of said State for said county, do find a certain record there remaining, in the words and figures following, to-wit:

New York Seal.

b Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 29th day of May in the year of our Lord one thousand nine hundred and two, before the judge of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, May 29th, 1902.

c GEORGE W. CROSSMAN and Another, etc., Appellants,
ag'st
THEODOR G. LURMAN and Another, etc., Respondents.

Be it remembered, that on the 8th day of April in the year of our Lord one thousand nine hundred and one George W. Crossman and another etc. the appellants in this action, came here into the court of appeals, by Dili, Bomeisler and Baldwin, their attorneys, and filed in the said court a notice of appeal and return thereto from the order and judgment of the appellate division of the supreme court in and for the first judicial department. And Theodor G. Lurman and another etc. the respondents in said action, afterwards appeared in said court of appeals by Charles Stewart Davison their attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

d Whereupon, the said court of appeals having heard this cause argued by Mr. Frederic R. Kellogg of counsel for the appellants, and by Mr. Charles Stewart Davison of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, *e* by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals.

CLERK'S OFFICE, ALBANY, *May* 29, 1902.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein, attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

f Filed Apr. 8, 1901.

STATE OF NEW YORK:

Court of Appeals.

Filed June 2, 1902.

GEORGE W. CROSSMAN ET AL., Plaintiffs-Appellants,
against
THEODOR G. LURMAN ET AL., Defendants-Respondents.

Case on Appeal.

Dill, Bomeisler & Baldwin, for plaintiffs-appellants, 27 Pine street, New York city.

Charles Stewart Davison, for defendants-respondents, 56 Wall street, New York city.

1 STATE OF NEW YORK:

Supreme Court, Appellate Division, First Department.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Brother, Plaintiffs-Appellants,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Company, Defendants-Respondents.

Statement under Rule 41.

This action was commenced by the service of a summons with the complaint on the 14th day of November 1894. Issue was joined

by the service of defendants' answer on the 30th day of November, 1894.

2 The names of the original parties in full are above set forth.

This case was originally tried before Mr. Justice McLean and a jury on the 4th day of January, 1898. The jury rendered a verdict for the plaintiffs for $1,547.95, and from a judgment entered thereon, and an order denying a new trial on the judge's minutes, the defendants appealed to the appellate division on the 14th day of April, 1898. On the decision of the appellate division judgment was duly entered, reversing said judgment and ordering a new trial. A new trial was had herein before Mr. Justice Smythe and a jury on the 3d day of May, 1899, and a jury rendered a verdict for the defendants, and from a judgment entered thereon and from an order denying a motion for a new trial on the judge's minutes, the plaintiffs appealed to the appellate division, August 30, 1899.

The appellate division again reversed the judgment and ordered a new trial, which was had before Mr. Justice Beach and a jury on the 11th day of April, 1900, and resulted in a verdict for the defendants.

From the judgment entered thereon and from an order denying a motion for a new trial on the judge's minutes the plaintiffs appealed to the appellate division on June 12th, 1900.

There has been no change of parties or attorneys.

3 *Summons.*

Supreme Court of the State of New York.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Bro., Plaintiffs, *against* THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Co., Defendants.	Trial Desired in the City and County of New York. Summons.

To the above named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated November 12, 1894.

DILL, SEYMOUR & KELLOGG,
Plaintiffs' Attorneys, 27 and 29 Pine Street.

Office and post office address, New York city.

4

Complaint.

Supreme Court, City and County of New York.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Bro., Plaintiffs,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Co., Defendants.

The above named plaintiffs, by Dill, Seymour & Kellogg, their attorneys, complaining of the defendants above named, respectfully show to the court:

I. That at all the times hereinafter mentioned, the said plaintiffs were and still are copartners residing in and duly carrying on business in the city of New York, pursuant to law, under the firm name of W. H. Crossman & Bro., and that the said defendants at all the said times were and still are copartners residing in and carrying on business in the State of Maryland, under the firm name of Theodor G. Lurman & Co.

II. That heretofore, and on or about the 17th day of July, 1894, the above named plaintiffs, under their firm name of W. H. Crossman & Bro., agreed in writing to sell and deliver to the above named defendants, under their firm name of Theodor G. Lurman & Co., and the said defendants, in consideration thereof, agreed in writing to purchase and receive from the said plaintiffs certain bags of Rio coffee, described as "flat bean coffee," to wit, about
5 five hundred (500) in number to be shipped at Rio de Janeiro for New York by the steamship *Catania*.

Of the said coffee about two hundred and fifty (250) bags was to be in grade about number eight and about two hundred and fifty (250) bags in grade about number nine, according to the standards of the Coffee Exchange of the City of New York; that all of the said coffee was to average in grade about standards numbers eight and nine of the Coffee Exchange of the City of New York, and that the sale price of the said coffee was to be exactly ascertained upon the average grading of the said coffee when received, and was to be upon a basis of fifteen (15) cents per pound for standard number eight.

That pursuant to the said contract, the said coffee was to be delivered to the said defendants in store at the port of New York. That the said defendants were to have the first month's storage and fire insurance upon the said coffee free of expense; that the said coffee was to be weighed as wanted by the buyers within thirty days from the date of bill; and that at the expiration of the said thirty days the remaining portion thereof was to be weighed.

That the *terms of payment* of the said coffee were bill to date when coffee is all in store; basis ninety day notes, payable in cash as taken from warehouse, less discount at the rate of eight per cent. per

annum for unexpired time; full settlement in thirty days from date of bill.

That it was further provided by the said contract that the said coffee was to be graded by Messrs. Mackie & Small, and that should their average grading be unsatisfactory to the buyer, the latter should without delay, and at their expense, appoint a grader licensed by the Coffee Exchange of the City of New York, and in the event of his average grading differing from average grading first
6 submitted to buyer, and the two graders not being able to adjust the difference, they should mutually agree upon and name a third grader, also licensed, to act as arbitrator in the matter.

It was further provided in said contract that all samples and the detailed gradings of the two first graders should be submitted to the arbitrator, and the average grading named by him was to be accepted by seller and buyer as the basis for the sale price.

It was further provided in said contract that the expense of the arbitration was to be paid by the party whose grader's average grading differs most from the average grading of the arbitrator.

It was further provided in said contract that differences in exchange grades were to be those existing at date of said contract.

It was further provided in said contract that buyers have privilege of calling for a grading on ship samples, subject to confirmation by samples drawn from bags on arrival of the coffee.

It was further provided in said contract that arbitration was to be had in accordance with the grading clause on the contract; and it was understood and agreed that the graders or arbitrators to be selected should be limited to the partners or employees of five firms to be selected by the seller.

III. That thereafter and on or about the thirteenth day of August, 1894, the coffee mentioned in the foregoing contract duly arrived at the port of New York upon the said steamship Catania and was thereafter duly placed, pursuant to the terms of the said contract, in store at the port of New York, subject to the order of the said defendants, upon compliance with the terms of the said contract, and was duly thereupon tendered and offered to said defendants; that the said coffee thus received comprised about five hundred bags of Rio coffee, of which about two hundred and fifty bags were
7 of about grade number eight, and about two hundred and fifty bags were of about grade number nine, according to the standards of the Coffee Exchange of the City of New York, and that the said coffee averaged in grade about said standard numbers eight and nine of said Coffee Exchange of the City of New York.

That thereafter all of the said coffee was, pursuant to the terms of the said contract, duly graded by the said Mackie & Small, and the average grading thereof duly ascertained, and that upon such average grading it was found that the said average grade of the said coffee was about standard numbers eight and nine of the Coffee Exchange of the City of New York; that the quality of the said coffee was in all respects as called for by the terms of the said contract;

that the said coffee and each and every part thereof was a good delivery under the said contract.

That the said defendants were thereafter, in due course of business, duly notified of all of the foregoing facts, and were duly required to accept and to take the said coffee out of storage, and to pay for the same pursuant to the terms of the said contract.

IV. That the said defendants thereafter, pursuant to the terms of the said contract, appointed a grader licensed by the Coffee Exchange of the City of New York to grade the said coffee, and that thereafter a difference resulted between the gradings of the said coffee by the said grader and by the said Mackie & Small, which said difference said graders were not able to adjust, and that thereafter a third licensed grader was appointed, pursuant to the terms of the said contract, to act as arbitrator in the matter.

That thereafter all samples and the detailed gradings of
8 the first two graders were duly submitted to the said arbitrator, and the average grading of the said coffee was duly ascertained by him, and that upon such average grading by the said arbitrator it was duly found that the said coffee averaged in grade about standard numbers eight and nine of the Coffee Exchange of the City of New York, and that the average quality of the said coffee was in all respects as called for by the terms of the said contract, and that the said coffee and each and every part thereof was a good delivery under the terms of the said contract, and that the sale price thereof upon the basis provided by said contract was $9,269.80.

That the said defendants were duly notified of all of the foregoing facts.

That the said plaintiffs have duly complied in all respects with each and every condition of the said contract upon them imposed.

V. That the said defendants have been repeatedly required to accept and receive the said coffee, and pay the said sum of nine thousand two hundred and sixty-nine dollars and eighty cents ($9.269.80) therefor. That the said defendants have expressly notified these plaintiffs that they refused to accept the said coffee. That said defendants have not accepted the same, but have in all respects neglected and refused to take the same and to comply with the terms of said agreement and to pay the purchase price of the said coffee.

VI. That thereafter and prior to the commencement of this action, and within a reasonable time after the proceedings above mentioned, the said coffee was duly sold at public auction in the city of New York by the said plaintiffs for and on account of the said defendants.

That the said defendants had full and reasonable notice of the time, place and conditions of the said sale; that upon the said sale the net proceeds of the said coffee, after the deduction of nec-
9 essary expenses, including weighing expenses, amounted to seven thousand nine hundred and ninety-one dollars and ninety-seven cents ($7,991.97).

That between the expiration of the first month after the receipt and storage of the said coffees and the time of the said sale, these

plaintiffs were forced to necessarily expend in the care and preservation of the said coffee on account of fire insurance, the sum of eleven dollars and sixteen cents ($11.16) premium, and on account of storage of the said coffee, the sum of thirty-nine dollars and ninety-two cents ($39.92).

That by reason of the said deficiency upon the said sale, and necessary expenses connected therewith, and connected with the preservation of the said coffee, and after allowing the said defendants all discounts, there remains a deficiency of thirteen hundred dollars and eighty cents ($1,300.80) resulting from the said sale and the said expenses, in which said sum the above named plaintiffs have been damaged by the wrongful acts of the said defendants, and their refusal to complete the said contract.

That payment of the said sum has been duly demanded by the said plaintiffs from the said defendants, on or about November 7, 1894, but said defendants have neglected and refused to pay the same, and no part thereof has been paid.

Wherefore, these plaintiffs demand judgment against the said defendants for the said sum of thirteen hundred dollars eighty cents ($1,300.80), together with interest from November 7, 1894, and the costs and disbursements of this action.

DILL, SEYMOUR & KELLOGG,
Attorneys for Plaintiff-.

Office and P. O. address, 27 Pine street.

10 CITY AND COUNTY OF NEW YORK, *ss:*

George W. Crossman, being duly sworn, says: That he is one of the above named plaintiffs; that he has read the foregoing complaint; that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

GEORGE W. CROSSMAN.

Sworn to before me this 14th day of November, 1894.

GEO. W. MARK,
Commissioner of Deeds, N. Y. City.

Answer.

Supreme Court, City and County of New York.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Bro., Plaintiffs,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Co., Defendants.

The defendants above named answer the complaint in this action as follows:

First. They admit paragraph first thereof.

Second. They admit the allegations of paragraph second thereof which purport to set forth substantially the contract entered into between the plaintiffs and defendants of the city of New York
11 on or about the 17th day of July, 1894, but for greater certainty they beg leave to refer to one of the duplicate originals of said contract when the same shall be produced upon the trial of this action as to the exact terms and conditions thereof, the said contract having been made and entered into in writing.

Third. They admit that on or about the 13th day of August, 1894, the steamship *Catania* arrived at the port of New York, having on board a large amount of coffee, but they deny each and every allegation other than the arrival of said steamship, contained in paragraph three of the said complaint, and, on the contrary, they allege that upon the arrival of said steamship *Catania* in New York, samples were forwarded to these defendants of the articles which the plaintiffs proposed tendering under the contract entered into between the plaintiffs and defendants; that on examination the said samples were found to embrace samples of coffees which had been colored, coated, polished and powdered, whereby damage was concealed and they were made to appear better than they really were, and of greater value, in contravention of the provisions of chapter 661 of the Laws of 1893 of New York, forbidding the selling or offering for sale of such adulterated foods, and they allege that thereupon they offered to accept under said contract and pay in accordance with the terms thereof for such goods as were not obnoxious to law or to receive substituted goods which should be lawful goods in place of the adulterated coffees tendered; that the plaintiffs wholly declined and refused to either deliver the unadulterated coffees without the adulterated coffees or substitute unadulterated coffees for the adulterated coffees.

Fourth. They deny that the plaintiffs have complied with the conditions of said contract upon them imposed.

12 Fifth. They admit that they, the defendants, have been repeatedly required to accept and receive as a whole the 500 bags of coffee as above mentioned tendered to them, including the adulterated coffees, and admit that they have expressly notified the plaintiffs that they refused to accept the adulterated coffees, and they admit that they have not accepted the same, but they deny that they in any respect neglected or refused to comply with the terms of said contract, and on the contrary they allege that so far as the plaintiffs have rendered it possible for them so to do, they have fully complied with each and every requirement and the terms of said contract on their part; and they allege that the said plaintiffs have failed and neglected and refused to comply with the terms of said contract on their, the said plaintiffs' part to be done and performed; they deny that the plaintiffs have been damaged by any of their acts in the premises; they admit that the plaintiffs have demanded from them the sum of $1,300.80 and they admit that they have refused to pay the same.

Wherefore, they demand judgment against the plaintiffs dismissing the complaint in this action and for their costs therein.

DAVISON & CHAPMAN,
Defendants' Attorneys.

Office and post office address, 56 Wall street, New York city.

STATE OF MARYLAND, *City of Baltimore,* } *ss.:*

Benjamin D. Williams, being duly sworn, says: That he is one of the defendants above named; that he has read the foregoing answer; that the same is true of his knowledge except the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

(S'g'd) BENJAMIN D. WILLIAMS. [SEAL.]

13 Sworn to before me this 28th day of November, 1894.

(S'g'd) THOS. M. DOBBIN,
A Commissioner of Deeds for the State of New York, Residing in Baltimore, City of Maryland.

Extract from Minutes.

Supreme Court, Trial Term, Part III.

GEORGE W. CROSSMAN ET AL.
against
THEODORE G. LURMAN ET AL.

April 11, 1900.

Present: Hon. Miles Beach, justice.

I hereby certify that this cause was this day tried by the court and a jury, and a verdict rendered therein for the defendants.

Motion for a new trial denied.

Thirty days' stay of execution after notice of entry of judgment. Thirty days to make a case. Five per cent. allowance.

WM. SOHMER, *Clerk.*

14 *Affidavit of No Opinion.*

New York Supreme Court.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Brother, Plaintiffs-Appellants,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Company, Defendants-Respondents.

COUNTY OF NEW YORK, *ss.:*

Arthur J. Baldwin, being duly sworn, says: That he is one of the attorneys for the plaintiffs-appellants in the above entitled action;

that no opinion was rendered by Mr. Justice Beach on the trial of this action or on the denial of the motion for a new trial.

ARTHUR J. BALDWIN.

Sworn to before me this 11th day of October, 1900.

JOHN S. PARKER,
Notary Public (6), *N. Y. Co.*

15

Order Denying Motion.

At a trial term, part III of the supreme court, held in and for the county of New York, at the county court house, in said county on the 31st day of May, 1900.

Present: The Honorable Miles Beach, justice.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Brother,

against

THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Company.

Order Denying Motion for a New Trial, &c.

The plaintiffs having moved upon the judge's minutes at the close of the trial herein to set aside the verdict and grant a new trial upon the exceptions taken herein, and because the verdict was contrary to the evidence and contrary to law, and upon each and all the grounds contained in section 999 of the Code of Civil Procedure:

Now, upon the minutes and all the pleadings and proceedings herein, on motion of Charles Stewart Davison, attorney for the defendants it is

Ordered, that said motions be, and the same hereby are, denied without costs.

Enter.

MILES BEACH, *J. S. C.*

16

Judgment.

Supreme Court, New York County.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Bro.,

against

THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Co.

The issues in this action having been brought on for trial before Mr. Justice Beach and a jury, at a trial term of this court, held at the New York county court house, on the 9th day of April, 1900, in the city and county and State of New York, and the parties appearing by counsel, and the issues having been tried by the court and a

jury, and a verdict having been duly rendered therein for the defendants, on the 11th day of April, 1900, and the costs of the said defendants having been duly adjusted at $826.19, the same including an extra allowance of $90;

Now, on motion of Charles Stewart Davison, attorney for said defendants, it is

Adjudged, that the said defendants do have and recover judgment against the plaintiffs upon the issues in this action and for the sum of $826.19, their said costs as taxed herein and do have execution therefor against the plaintiffs.

Judgment signed and entered this 31st day of May, 1900.

(S'g'd) WM. SOHMER, *Clerk.*

17 *Notice of Appeal.*

Supreme Court, New York County.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Brother, Plaintiffs,
against
THEODOR G. LURMAN and BENJ. D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Company, Defendants.

Please take notice that the plaintiffs, George W. Crossman and Herman Seilcken, appeal to the appellate division of this court in and for the first department thereof, from the judgment entered herein in the office of the clerk of New York county on the 31st day of May, 1900, in favor of the defendants and against the plaintiffs, and also from the order denying plaintiffs' motion for a new trial, made and entered herein on the 31st day of May, 1900, in the New York county clerk's office, and from each and every part of said judgment and order.

Dated New York, June 11th, 1900.

DILL, SEYMOUR & KELLOGG,
Attorney for Plaintiffs-Appellants,
27 Pine St., New York City.

18 To William Sohmer, Esq., New York county clerk, Charles Stewart Davison, Esq., attorney for defendants-respondents.

Stipulation.

Supreme Court, New York County.

GEORGE W. CROSSMAN ET AL.
against
THEODOR G. LURMAN ET AL.

NEW YORK, FRIDAY, *February* 17, 1899.

Hereby stipulated by the above named parties that in order to avoid the necessity of producing or offering testimony at the trial of

the action, the following concessions of fact may be read in evidence, subject to all legal objections other than the objection as to any such fact that the same is not proven in proper form and manner:

1. The details in the answer of the averments of paragraph III. of the complaint are modified by admitting that on or about the 14th day of August, 1894, 500 bags of Rio coffee, known as flat bean coffee, arrived at the port of New York, from Rio de Janeiro, upon the steamship *Catania*, consigned to the above named plaintiffs, and was thereafter, in the ordinary course of discharging cargo, placed in store at the port of New York, and immediately tendered as an entirety to the defendants by the plaintiffs, and that the said tender was refused by the defendants.

19 This concession is not to be construed as relating to the quality of said coffee.

2. That in connection with the tender of said 500 bags to the defendants as an entirety, samples, as usual in the coffee trade in New York city, were caused to be forwarded to the defendants by the plaintiffs, and were received at Baltimore by said defendants, and that samples of said coffee were analyzed by the firm of Lehman & Glaser, chemists, of the city of Baltimore.

3. That in accordance with the usual course of the coffee business in the city of New York, samples of said coffees were also received by the firm of L. W. Minford & Co., coffee brokers of said city, and samples of said coffee were forwarded by said L. W. Minford & Co., to Lawrence & Crane of Baltimore, and there received by them.

4. The samples of said coffee were submitted for grading to Irvin A. Sprague, a coffee broker of New York city.

5. Further samples of said coffees were submitted for grading to Cyrus K. Small, a coffee broker of the city of New York and to Frederick Schilling, Jr., also a coffee broker of said city, and other samples of said coffee were analyzed by the firm of Ricketts & Banks, chemists of the city of New York.

6. That defendants offered to accept, under the contract, a portion of the coffees tendered, but that they objected to the balance thereof upon the ground that the same were colored, damaged, unmerchantable and far below grade purchased. That they requested plaintiffs to substitute other coffees in place of the coffee thus objected to, which request, however, the plaintiffs declined.

7. There is in the city of New York a corporation known as the Coffee Exchange of the City of New York, composed of persons who buy, sell and deal in coffees.

20 8. That the Coffee Exchange of the City of New York selects from time to time samples of coffee to serve as standard samples for the purpose of classification of coffees to be sold and dealt in on the Coffee exchange in the city of New York, and upon which samples the standard numbers of coffee of the Coffee Exchange of the City of New York are founded.

That the said samples, at all times in issue in this action, were, now are, and always have been coffees which are not adulterated within the meaning of the term as defined by the laws of New York.

This concession not to be construed as preventing either party from introducing evidence as to any other characteristics or qualities of said samples or grades which may be claimed to exist.

9. At the time of the making of the contract and the arrival of the coffee in question in this action these standard samples were known by numbers, to wit, from number 1 consecutively down to number 9.

10. At the time of the making of the contract and the arrival of the coffee in question the differences in the said grades or numbers, to wit, the number of so-called points of difference between the different grades were as follows: Between standard samples Nos. 1 and 2 there were 25 points of difference; between Nos. 2 and 3 there were 25 points of difference; between 3 and 4 there were 25 points of difference; between Nos. 4 and 5 there were 35 points of difference; between Nos. 5 and 6 there were 25 points of difference; between Nos. 6 and 7 there were 50 points of difference; between Nos. 7 and 8 there were 50 points of difference; between Nos. 8 and 9 there were 40 points of difference.

11. When coffee was graded the differences (where the coffee was not found to be of some exact number) were represented by the use of such expressions as 9 +.20, 6–.5, &c., &c.

21 12. In relation to the above grade numbers or standard sample numbers the smaller the grade number the better the quality of the coffee, while the numbers preceded by the plus or minus signs (representing the fractional differences between grades) the higher the number, if preceded by a minus sign, the poorer the coffee; while if preceded by a plus sign the better the coffee. In other words, 6–.25 and 7+.25 would represent exactly the same grade of coffee, while No. 2, for example, would represent a better grade of coffee than No. 3, No. 7 a better grade of coffee than No. 8, and No. 7–.23 would represent a poorer coffee than No. 7+.13. So also for example No. 7+.23 would represent a better grade of coffee than No. 7+.13.

13. The exact differences of grade found by the different graders and the third grader who arbitrated the grades were as follows:

The original average grading of Mackey & Small on behalf of the plaintiffs was 9+.1493. The original average grading of Mr. Sprague, who graded for the defendants was 9–.3213. The average arbitrated grading of Mr. Frederick Shilling, Jr., who arbitrated the grades was 9–.0491 (this figure represents what would be under the rules of the exchange and under the contract a good delivery for "8's and 9's").

14. For convenience any exhibit or other document used on the last trial of this action may be offered on the coming trial of this action from the printed appeal book without the production of the original exhibit in court.

15. The presence, in greater or less quantity, in coffee of small sticks, black beans, hulls, broken beans, musty beans, little stones, dirt, rain damaged beans, pale beans, swelled beans, sour beans are all taken into consideration in grading coffees, and the coffees which

22 are to be graded are classified by the graders by comparison with the said standards or standard samples of the exchange which under the rules of the exchange serve as the only guide. This classification or grading takes into account the presence of all such (and any other) defects in greater or less quantity, but is irrespective of the color or style of the coffee. This reference to color or style, however, does not in anywise mean artificial color, but merely that coffee is not to be graded any higher or any lower, because in natural color it is a light coffee or a dark coffee; equally good coffees come forward to this port from different ports or plantations, some light, some dark, sometimes most of the coffees in a given year being light and at other times dark. In other words, difference in the natural color of coffee is not regarded as an element entering into grading.

17. Upon either party reading any portion of this stipulation the opponents may thereupon read any other portion thereof, subject, of course, to its being not irrelevant.

CHAS. STEWART DAVISON,
Def'ts' Att'y.
DILL, SEYMOUR & KELLOGG.

Case and Exceptions.

New York Supreme Court.

GEORGE W. CROSSMAN ET AL.
against
THEODOR G. LURMAN ET AL. } Trial Term, Part III.

Before Mr. Justice Beach and a jury, New York, April 9th, 1900.

23 *Appearances.*

For the plaintiffs: Arthur J. Baldwin, Esq. Frederick R. Kellogg, Esq., of counsel.

For the defendants: Charles Stewart Davison, Esq. Austen G. Fox, Esq., of counsel.

The following case contains all the evidence taken and proceedings had on the trial of the action:

Mr. Kellogg opened for the plaintiffs.

Contract admitted in evidence, and marked "Plaintiffs' Exhibit 1," which is as follows:

"NEW YORK, *July 7th*, 1894.

"Sold for account of Messrs. W. H. Crossman & Bro., to Mess. Theo. G. Lurman & Co., Baltimore, Md.

About 250—No. 8, 250—No. 9. Five hundred (500) bags Rio coffee, (sound and made sound portion) to be shipped at Rio de Janeiro by Str. Catania.

"Coffee to average in grade about standards Nos. 8 & 9 of the

Coffee Exchange of the City of New York. Sale price on a basis of 15 cts. per lb. for standard No. 8.

No. arrival, no sale.

Mackey & Small.

Terms.—Bill to date when coffee is all in store; basis, ninety-day notes; payable in cash as taken from warehouse, less discount at the rate of eight per cent. per annum for the unexpired time; full settlement in thirty days from date of bill.

"Buyers to have first month's storage and fire insurance on this coffee free of expense. The coffee to be weighed as wanted by buyers within thirty days from date of bill; at the expiration of thirty days the remaining portion is to be weighed.

"Grading.—The coffee is to be graded by Mackey & Small.

24 Should their average grading be unsatisfactory to the buyer, the latter shall, without delay, and at their expense, appoint a grader licensed by the Coffee Exchange of the City of New York, and in the event of his average grading differing from average grading first submitted to buyer, and the two graders not being able to adjust the difference, they shall mutually agree upon and name a third grader, also licensed, to act as arbitrator in the matter. All samples and the detailed gradings of the two first graders shall be submitted to the arbitrator, and the average grading named by him is to be accepted by seller and buyer as the basis for the sale price. The expense of the arbitration is to be paid by the party whose grader's average grading differs most from the average grading of the arbitrator. Differences in exchange grades to be those existing at date of this contract.

"Buyers have privilege of calling for a grading on ship samples, subject to confirmation by samples drawn from bags on arrival of the coffee.

"Described as flat bean coffee.

"L. W. MINFORD & CO., *Brokers.*"

Endorsed across the face: "Accepted.

"THEODOR G. LURMAN & CO."

With the following rider annexed to the document:

"Arbitration is to be had in accordance with the grading clause on the contract. It is understood and agreed that the graders or arbitrators to be selected shall be limited to the partners or employees of five firms, to be selected by the seller."

Mr. Kellogg then offered and read in evidence paragraphs 1, 6, 7, 8 and 13 of the stipulation. (Printed on page 18 of this case.)

The plaintiffs rest.

Mr. Fox opened for the defendants.

25 Mr. Fox: I read the following admission from the first trial; page 132, folio 394:

"Mr. Kellogg: There is no question but that this coffee had a foreign coloring matter upon it."

Mr. Fox then read in evidence the remaining portions of the stipulation, paragraphs 2, 4, 5, 9, 10, 11, 12, 14, 15 and 17. (Printed on page 18 of this case.)

GEORGE W. CROSSMAN, one of the plaintiffs, called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Fox:

I was present at the last trial of this action held in May, 1899. Upon that occasion I was called as a witness in my own behalf. I testified quite at length.

On board the Catania we had a very large shipment, some 27,500 bags of coffee in round numbers. A portion of that was bought from one concern, and another portion from other firms in Brazil. Some was bought by ourselves, and some through cable messages through a broker. This particular lot that is in dispute between us and the defendants came out of a portion of a lot of 13,750 bags which was bought from one man in Brazil. The greater portion of that lot was of the same grade. My testimony upon the first trial was: "Most of each lot was identically of the same grades." The contract for the purchase in Brazil of these coffees and for their sale here were made at about the same time. The sale was made subsequent to the purchase. The sale to defendants was made a short time subsequent to the purchase by us of the coffees in Brazil. My testimony on the first trial was: "By referring to the date of the contract in suit I am enabled to say that we had purchased the coffee in Brazil several days before its making." I have since
26 ascertained that it was more than several days. My testimony upon the first trial in that regard was incorrect. The facts are that they were made, I think, about thirty days after. The wording of the contract under which we purchased in Brazil was substantially the same in form as the contract of sale between us and the defendants. In that cargo which came by the Catania there were some 1500 or 1600 bags of artificially colored coffees. I did not personally make any inquiry or examination to see what the facts were in that regard. I have always known that since the defendants rejected this coffee, and at that time, they claimed it was artificially colored. When that claim was made to my firm I did not, as a matter of fact, make any inspection of any part of this coffee in order to assure myself whether or not the statement made by the defendants that this coffee was colored artificially was true or not. I remember that on the last trial the court before whom the case was then tried, put certain questions to me upon this subject. My testimony upon the former trial was: "Question by the court: Did you have anybody else examine it for the purpose of ascertaining what truth there was in it?" My answer was, "Yes." I personally had no one to examine, I didn't request any one to examine it.

I had at that time a Mr. Pickslay, who was my confidential broker. I was not aware at the time that the defendants made the charge or

statement that the coffee was colored by artificial coloring matter, that that involved the question whether the coffee was colored or not. I did not understand from the defendants' statement or charge against us in their refusal to take it, that we had attempted to deliver to them coffee which was colored by artificial coloring matter in such a way that it involved the question whether the coffee was adulterated or not. I didn't understand that.

There were certain proceedings taken in the Coffee ex-
27 change. After Mr. Lurman had used up the Coffee exchange, so far as the defendants were concerned, I mean to say he had appealed to the various committees, and after his appeals and decisions had been rendered, then it became necessary for us to do likewise. It became necessary for us to complain about Mr. Lurman, for not paying for the coffees, taking and paying for the coffees. We made a charge against him. He was suspended. He brought proceedings in court. He was reinstated as the result of those proceedings. The decision was not rendered until after he had served the term. I did not appear myself. I made an affidavit.

Q. Now, Mr. Crossman, didn't you state in the affidavit as follows, that you personally examined the samples of the coffee in dispute?

A. That was an error. I personally conducted before the adjudication committee the proceedings on behalf of my firm, which were had on the complaint of my firm. I was summoned before the board of managers. I conducted the proceedings personally on behalf of my firm. My firm ordered this coffee from a man in Brazil, called Carl Krisch. Mr. Sielcken and I are the two partners of the firm of William H. Crossman & Company, the only partners. I knew that this was ordered from Mr. Carl Krisch. We had received coffees from this man in Brazil before. When the defendants complained to us that this coffee was colored, and charged us with delivering colored coffee, we did not confer at all with Mr. Carl Krisch upon that subject. I have been in the coffee business about twenty years. We are one of the largest houses in the city of New York. I I am familiar with coffee, more or less, its appearance.

Q. Now, I show you some coffee which I have poured out of the exhibit for identification marked "Coffee Exchange, Rio No. 9, of the City of New York." You see some beans that are known
28 in the trade as damaged beans, don't you; frankly, Mr. Crossman, don't you?

A. I can hardly answer that about damaged beans; I see black beans and discolorations, and all that sort of thing, but as to the damaged portions of it I do not know, because I am not an expert and really can't qualify.

Q. I am not trying to qualify you as an expert. Isn't it a fact that you know yourself, having been dealing in coffee for twenty years, that in almost all No. 9, as distinguished from No. 1, there is a greater or less admixture of damaged beans, damaged in different ways?

A. Yes, that is what makes it No. 9.

Q. And you find in that pan which I now show you certain beans under that general description, don't you?
A. I do.

(Counsel for the defendants exhibits to the jury some of the poured out coffee shown to the witness.)

Mr. KELLOGG: That I object to until it is properly identified.

Mr. FOX: I can't mark these beans that have now been identified by your own client.

Mr. KELLOGG: They have not been identified as anything except coffee.

Mr. FOX: He says they are damaged beans.

Mr. KELLOGG: Unless the coffee in question is identified as some of the Coffee exchange, or some of the exchange samples, I object to the jury seeing it.

Mr. FOX: We have in court, and we shall connect it, the man who brought it. We have now done one thing; we have to present what is not in the stipulation. In this No. 9 coffee there are damaged beans. When we put the coffee in evidence there will be coffee colored up more or less with coloring matter.

The COURT: They don't object to that. All they wish is the proof that that sample which you have is No. 9.

Mr. FOX: I will do that by our next witness.

29 The COURT: Then finish with this witness, because you can't exhibit that to the jury until you give that proof.

(Mr. Fox shows witness certain coffee.)

Q. Can you pick out what you mean by a black bean there, if so, kindly do it?

A. They are apparent here. I should call that a black bean (indicating). I should call that a black bean (indicating). After all, these may not be known in the trade as black beans; I am picking out what I consider a black bean.

Q. What other kind of damaged beans do you see there, only one or two, I shall not detain you but a moment?

A. There seem to be some broken beans.

Q. Will you pick out one of those, what you mean by broken, one will do?

(The witness picks out a broken bean.)

Q. You spoke of sour beans, didn't you; what are sour beans?

A. I haven't the remotest idea; I don't know anything about sour beans.

Q. You have heard of the term, haven't you?

A. Yes, sir.

Q. You don't know it when you see it?

A. No.

Q. You know what is meant by a Quaker bean, do you not?

A. I understand it to be a white bean.

Q. Do you see it there?

A. No, I don't see any white beans here.

Q. Do you think you could see any better if you took it to the light?
A. No, I don't believe I could; I can see here pretty well.

Mr. Fox: I will offer in evidence these three black beans and one broken bean. I can't have them marked very well.

Q. Do you find any brown beans in there?
A. Yes.
Q. Will you put a brown bean on there, just to please me?

(The witness puts a brown bean on the paper handed him.)

Mr. Fox: These are offered in evidence.

30 (Counsel for the defendants exhibits the beans picked out by the witness to the jury.)

Q. Do you find any withered beans in there, while I am showing these to the jury. Have you got a withered bean?
A. Yes; what I should call a withered bean.
Q. Will you put it on there?

Mr. Fox (to the jury): Gentlemen, here it is, what is called a withered bean.

We haven't any coffee beans in our office. We do not have sample boxes. They are kept by our brokers. The whole business is done through brokers. Our brokers are principally Williams, Russell & Co. Pickslay is a member of that firm.
Q. Would you call those that I now show you pale beans—you said some brown and some black?
A. I wouldn't pass on those as being pale or brown or anything.
Q. You notice a difference in color, don't you?
A. From some other beans?
Q. Yes?
A. Yes, sir.
Q. In other words, Mr. Crossman, in No. 9 coffee you do know, do you not, that as a part of the definition of No. 9 coffee there are beans in it of different shades of color; you know that, don't you?
A. I know that No. 9 coffee is an inferior quality or grade.
Q. One thing that makes it inferior is it contains beans in different shades of color?
A. And stones and sticks also.
Q. Also contains all different shades of color?
A. Yes, sir.

A sample of coffee admitted in evidence and marked Defendants' Exhibit A.

Q. Defendants' Exhibit A contains damaged beans?
A. I don't know.

Q. Have you at any time seen any of the coffee which you
31 tendered to the defendants and which they refused to receive?

A. On one occasion the sample was submitted to me, and I was told that that was a sample of the beans. Before the suit I was

shown certain samples of coffee which Mr. Pickslay examined, and which he told me were samples of the coffee tendered by us to the defendants. They were simply pointed out in passing remark. I don't know what you mean by showing. I don't know whether you mean explained or examined. We did not make any complaint or protest to the man in Brazil from whom we received the coffee which we tendered to the defendants.

Cross examination by Mr. KELLOGG:

Q. Some question has been made as to your having these samples of coffee in your own store and as to your not having examined them personally. I wish you would state so far as you know just exactly where these samples were kept, and who did examine them, so that the jury may understand just the situation that existed; where were they delivered from the ship, if you know?

A. To our brokers, as is usual, and in fact always the case. Messrs. Williams, Russell & Co.

As to the parties by whom the examinations of such coffees are made, we never make them personally. They are made by experts. In this instance, of this particular lot, first, Mr. Small examined them. Those gentlemen are the ones to whom we entrust all matters of examination of coffees bought by us. This coffee was not graded by anybody when it was tender-d to us by Krisch & Company. No samples are ordinarily kept in our store. They are kept down at our brokers' office; the same brokers to whom I have alluded. When goods are taken from the ship to the warehouse they are always in the original bags in which they were brought into the country.

Q. Who was the grader named in the contract between Mr. Krisch and yourself?

32 Mr. FOX: That I object to, as the contracts are not in evidence, and it is irrelevant.

The COURT: What relevancy has this, Mr. Kellogg?

Mr. KELLOGG: My friend has laid some stress, the purpose for which I do not profess to understand, upon the way in which the coffee came to Mr. Crossman. I simply wish to show the original contract under which he purchased, to make it clear to the jury just when he got it. I offer the contract in evidence.

Mr. FOX: I object to it as immaterial.

The COURT: I see no materiality to it.

Mr. KELLOGG: It is offered for the purpose of showing it was a similar contract to that which was sold to these defendants, and there was a grader named in the contract and who that grader was. Your honor excludes it?

The COURT: Yes.

Mr. FOX: I am willing to let the fact come in that it is a similar contract; but the contract itself I object to as irrelevant.

Mr. KELLOGG: My friend has examined Mr. Crossman in his own

case as to whether the contract was substantially the contract or not. I think that makes the contract relevant.

Mr. Fox: We take Mr. Kellogg's statement as being true.

Mr. Kellogg: I offer it for that purpose and ask that it be marked for identification.

Contract marked Plaintiffs' Exhibit 2 for identification. (Printed herein on page 139 of appendix.)

I did not either myself or by orders given to anybody else color any part of this coffee; my firm did not; and when the coffee was tendered to Messrs. Lurman & Co. it was still in the same original packages in which it was imported, so far as I know.

Mr. Fox: How do you know?

Mr. Kellogg: "So far as you know," I asked him."

33 Re-direct examination by Mr. Fox:

Q. Do you know whether it was or not?

A. I couldn't swear to that.

Q. When I asked you questions, you were careful to say you didn't know. When Mr. Kellogg asked you the question whether it was in the original packages you said it was. The fact is you don't know anything about it?

A. Because the trade is usually in that way.

Q. That is an argumentative answer. The fact is, you don't know anything about it personally, do you, Mr. Crossman?

A. I know in a general way, and in a way that I presume that everybody else would know.

Q. Does it occur to you that you didn't see the bags at all?

A. That occurs to me, yes.

Q. That is a fact, is it not?

A. I didn't see them, no.

Q. Before you leave the stand, so that there will be no question about the identity, will you please pour from that sample you have identified as containing damaged beans into the envelope handed to you by the officer, a considerable quantity, please?

(The witness pours out a quantity of beans into one envelope, and the rest into a second envelope.) The first envelope is marked Defendants' Exhibit B, and the second envelope was marked Defendants' Exhibit B–1.

Mr. Fox: We do not offer this as now proven to be standard No. 9. We offer them as beans containing among them damaged beans from which this witness has picked out certain beans.

Defendants' Exhibits B and B–1 admitted in evidence.

Q. Do you see any damaged beans in the sample that I now show you, or in that coffee that I now show you; frankly, do you?

A. Not that I would call damaged beans.

34 Mr. Fox: Now I offer those in evidence as being good beans.

Mr. Kellogg: That I object to.

The COURT: No; good coffee.

Mr. FOX: These beans I now offer in evidence, just referred to by the witness, came from the Coffee exchange as Rio No. 2 of the city of New York.

Mr. KELLOGG: That I object to as not proven.

Mr. FOX: These beans we offer in evidence, not as being proved to be No. 2 grade, but as beans referred to by the witness as good beans and not containing beans that he would speak of as damaged beans.

Envelope containing coffee beans admitted in evidence and marked Defendants' Exhibit C.

CAVILIER H. JOUET, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. FOX:

I live at Roselle, New Jersey. I am 39 years old. My occupation, chemist. I am connected with Columbia university, and have been for about three years. In 1894 I was a chemist for the firm of Rickett & Banks. Have been a chemist about 18 years.

Q. It is conceded, Mr. Jouet, that you were subpœnaed as a witness for the plaintiffs, Crossman & Brother, in this action and testified on their behalf on the first trial of this action; in January, 1898, you may remember it was in January, 1898. Then on the second trial of this action in May, 1899, you were subpœnaed as a witness on behalf of the defendants, and testified, were you not?

A. Yes.

Q. And upon this trial you have again been subpœnaed as a witness on behalf of the defendants, have you not?

A. Yes, sir. I am not here under the plaintiffs' subpœna. I know Mr. Crossman. I have seen him here in the court
35 room to day. I spoke to him this morning and bowed to him. At the request of Crossman & Brother, or some one representing them, I examined or subjected some of the coffee in controversy to a chemical analysis. I made an examination of the coffee. It was a chemical analysis.

Q. Upon the coffee you found a foreign substance, did you not?

A. I won't say it was upon the coffee, no, sir.

Q. I am—I will read you the very question put to you on the last trial: "And upon the coffee you found a foreign substance, did you not?" And you answered "Yes, sir." What you said was true, was it not, Mr. Jouet?

A. Well, upon or in the coffee.

Q. You mean some was on the surface and some of it had penetrated the inside, is that what you mean?

A. I couldn't say that. That was a form of iron that I discovered upon or in the coffee; it was some form of iron. That is a chemical substance; in certain quantities, opaque. It was a dense substance of a reddish color.

Q. Now, Mr. Jouet, isn't it a fact that some of the beans that you

examined there were, so far as you could tell, covered completely by whatever substance it was that you discovered on them or in them?

A. I couldn't positively state that, no, sir. I have read my testimony which you have shown me, on pages 42 and 43. I have not read that testimony before. I now find my recollection refreshed. I am able to testify that I did find on those beans a foreign substance. I found a chemical substance in or about the beans, on or in them. My testimony was that as near as I could see with my eye this substance did practically cover the whole of the bean in the samples which I examined.

Q. You testified to the fact when you testified for the plaintiffs—did you not, it was true?

A. I was misinformed at the time.

36 Q. Misinformed as to what, Mr. Jouet?

A. I couldn't say whether the iron that we found was in the bean or out of the bean, on the outside of the bean.

Q. You have not the beans in your possession now?

A. No, sir. I last saw any of those beans about five years ago. When I was called as a witness and testified on behalf of the plaintiffs I testified that this substance covered the beans evenly. I do not think I put it under a microscope. I don't remember making a microscopic examination; it is five years ago now.

Q. Now, I want to ask you, now that you have read your testimony as given upon the last trial when you testified on behalf of the defendants, whether it is not a fact that what you found upon the bean, so far as you could tell, covered the whole of the bean, so far as you could tell without a microscopic examination—isn't that the fact?

A. No, sir; I think I was misinformed about that. I am not willing to make that statement again. I don't think I have testified twice to that statement in court.

Q. I beg to show you the statement. When you say "misinformed" Mr. Jouet—didn't you see these beans?

A. I saw the beans, yes. I have testified twice in this action that I made a chemical analysis of the substance that was on the beans. I did it for Ricketts & Banks. I did it as carefully for Ricketts & Banks as I would have done for anybody else.

Q. Is it not a fact that this question was asked you upon the former examination, to wit: the last trial of this action in May, 1899: "Question. What was it that you found on these beans?" And did you answer: "I found evidences of iron." That is the fact, is it not?

A. Yes, sir, that is the fact.

Q. Then you were asked the question: "Oxide of iron, did you not?" And did you answer, "Presumably oxide of iron." Is that correct?

A. As far as I could draw such a deduction.

37 Q. Nothing has happened since you testified before the last jury, no fact has come to your attention or knowledge in re-

gard to these beans that you did not know when you testified the last time, has it?

A. It has, yes.

Q. Please pay attention to my question?

A. Yes, sir.

Q. No fact of your own personal knowledge has come to your attention so far as these beans are concerned that did not exist as a fact before you testified the last time; isn't that a fact?

A. No new facts may have come, no, sir.

Q. Isn't it a fact that you were asked the following question: "And that was over the whole of the beans so far as you examined them?" and that you answered, "So far as we could tell." Isn't that the fact?

A. I answered that, yes.

Q. Isn't it a fact that you were then asked the question: "Covering completely the bean?" and that you answered "Yes, sir; I should say so."

A. That was my answer.

Q. Isn't it a fact that you were then asked this question: "And this oxide of iron is a dense, opaque substance, is it not?" and that you answered, "A dense substance of a reddish color—red oxide of iron." Isn't it true that you were asked that question and gave that answer?

A. I didn't mean to give it that way.

Q. Isn't it a fact?

A. I know it is there.

Q. Isn't it a fact that you were asked that question and gave that answer; I am entitled to have you answer that yes or no?

A. Well, as far as I am able to draw, that question is there and evidently my answer; I suppose it was my answer.

Q. Isn't it a fact that you were then asked this question: "Opaque?" and that you answered "Opaque." Don't you find that there, and is that a fact that you gave that answer?

A. Yes, that answer is there.

38 Q. You gave that answer did you not?

A. I didn't understand it that way, no, sir.

Q. What do you understand to be the meaning of the word "opaque?"

A. If you want me to explain, it is a substance which is not easily seen through; it is the opposite of translucent; there are degrees of opaqueness though.

Q. Isn't it true that you were then asked this question: "This substance covered the whole of the beans evenly?" and that you answered "Yes, sir, evenly?"

A. That was my answer. I remember having testified before Mr. Justice MacLean and a jury in January, 1898.

Q. Mr. Jouet, I am going to give you the benefit of having before you a printed copy of your own testimony as given before Mr. Justice MacLean and a jury. Isn't it a fact, look up at the top of page

141, Mr. Jouet, that upon that occasion you testified that you found a foreign substance on the coffee?

A. According to this, yes. I have not much memory. I intended it to be true when I told that court and jury that I found a foreign substance on the coffee. And I intended to be truthful when I told the jury that that substance was a reddish color, reddish brown.

Q. And you intended to be truthful when you were asked: "Was it colored over the whole of the coffee or part of the bean?" and your answer was: "I could not say that positively. I should judge it was over the whole of the coffee." You intended that to be true did you not, Mr. Jouet?

A. Yes, sir.

Q. And you intended to be truthful when you stated that the coffee was not subjected to a micros-opical analysis, did you not?

A. Yes.

Q. And you intended to be truthful when you were asked the question: "As near as you could see with your eye it covered the whole of the bean?" and you answered, "The whole of the bean as near as I could see," did you not, Mr. Jouet?

A. Yes.

39 Q. And when you were asked the question: "As near as you could see with your eye it did cover the whole of the beans in the samples you examined, or substantially all?" You intended to be truthful when you answered: "As far as I could tell," did you not, Mr. Jouet?

A. Yes.

Q. When you were asked the question: "It covered them pretty evenly?" and you answered, "Evenly," you intended to be truthful in giving that answer, did you not?

A. Yes.

Q. And when you were asked the question: "And completely?" and you answered, "I could not say completely," you intended to be truthful in giving that answer, did you not?

A. Yes, sir.

Q. And when you were asked, "Fairly so?" and you answered, "Apparently so, yes," you intended to be truthful in that regard?

A. Yes.

Q. And when you were asked: "Equally as you could see with your eyes?" and you answered "Yes" you intended to be truthful?

A. Yes.

Q. And when you were asked: "I suppose you thought it was not necessary as you could see well enough without a microscope?" and you answered, "I was not asked to do that," that was true, was it not, Mr. Jouet?

A. Yes.

Cross examination by Mr. KELLOGG:

There is no question about my having made a chemical examination of this coffee at the time. There is no question but that I found at the time that upon a part of this coffee there was a foreign

coloring substance upon it or in it. I did not make a microscopic examination of it. I did not swear positively whether it was perfectly even over the entire bean or not. That was one of the reasons why I hesitated about answering when the question was put to me before. It is my desire when I give my answers on these
40 points to be absolutely accurate from a chemical standpoint. The beans when they came to us, if I remember accurately, were very dirty. We were told to pick out the beans, the coffee bean itself, and make some examination for anything which might be used for coloring coffees. We took some of the beans and tried them first with a solution of water, boiled them and bleached them, and examined the solutions. Another portion of the samples we tested with some dilute weak acid, and tested the solution; then we found in the latter case, after we applied several tests for different substances of which we found no evidence, when we looked for any iron we had evidence that very minute quantities of iron seemed to be present. After an extended examination the work was concluded so far as we were concerned in the laboratory. Iron is a part of the natural coffee bean. It was somewhat difficult from such an analysis as that for us to be sure whether the iron came from the outside or within the bean. I believe that is one of the reasons why I answered Mr. Fox as I did. In sufficient quantity oxide of iron is a substance which in sufficient quantity — entirely opaque. I should say no to the question as to whether it is opaque entirely if a very minute quantity is used. The question of opaqueness so far as oxide of iron is concerned depends largely upon the quantity in which it is used.

Q. I wish you would examine the sample that I have handed you and state whether, so far as color is concerned, you are able to say if that coffee is the same as the coffee which you analyzed in 1894?

A. I should say yes.

An envelope containing coffee just shown to the witness is marked Plaintiffs' Exhibit 3 for identification and another portion of the same coffee is marked Plaintiffs' Exhibit 3–A for identification.

I did not examine it with sufficient care and particularity
41 to enable me to be positive as to whether the coloring matter was evenly disposed over the entire bean. I examined it with the eye only. I have never had any experience in grading coffees at all. I know nothing about defects of any kind in coffees aside from their chemical composition. I cannot swear in any man-er as to whether any defects in the coffees which I examined were or were not concealed by any coloring matter whatsoever. I can't say that they were concealed or not concealed.

Q. Did you not so testify at the last trial, the following question being asked, did you give the following answer:

"By the COURT:

Q. Now you couldn't tell from that examination whether those beans were so covered with this red oxide of iron as to cover up any defect that might be in the bean? A. I couldn't tell that, no, sir."

Were you asked that question, and did you give that answer?
A. Yes, sir.

Re-direct examination by Mr. Fox:

Q. You find your memory brightened up a little bit, Mr. Jouet, since my direct examination, so that although you have not seen these beans for five years you felt able to tell this jury quite positively that the color is the same as it was when you saw them then?
A. In that respect I think I can state that clearly, yes.
Q. This sample that was shown you a little while ago, when did you see that last?
A. That sample that I put in the envolope?
Q. Yes.
A. I don't know; I couldn't say exactly.
Q. Give us your best recollection.
A. I don't know that I ever saw that particular sample before.
Q. How long ago is it since you have seen any sample of the coffee which you found in 1894 to be colored by some foreign substance?
A. I couldn't say.
Q. Have you some memory?
A. No, sir, I have not,
42 Q. When I ask you questions——
A. I have not been connected with that firm for some years; I don't know when I last saw the sample.
Q. Will you say to the jury that although you can pretend to give the very color and shade of coffee, you really can't recollect how many years since you saw the thing with which you are asked to compare the sample in court?
A. I don't remember the date I saw that.
Q. I am not asking you the very date.
A. I couldn't tell you the month.
Q. Would you risk your memory on the year, perhaps?
A. No, sir, I couldn't tell you the year.
Q. What was the color of the coffee which you saw in 1894, reddish brown, was it not?
A. I think not.
Q. Not—you remember?
A. Not my idea of reddish brown.
Q. How do you describe the color of the coffee which has just been shown you?
A. I should call that greenish.
Q. That you are pretty clear about?
A. Greenish.
Q. And you mean to say that whatever the color of the original coffee may have been so far as description of it is concerned, it was substantially the same as this, is that so?
A. So far as my general memory is concerned.
Q. Have you got a memory that you really can trust on shades?
A. Yes, I have.

Q. Got a fine memory on shades of color?
A. Yes.
Q. But not on other things quite so good?
A. I think I have in some respects.
Q. A little better memory on color than on other things, haven't you?
A. I couldn't say about that.
Q. I suppose the reason why you could not tell whether any defects or damage in these beans was covered up by this substance is that you had never seen beans before the coloring matter was put on; you never saw these coffee beans before the coloring
43 matter was put on, of course?
A. Why, you must remember that——
Q. Did you see the beans?
A. They may have been in court here.
Q. Did you see these beans before they were in court?
A. You mean these beans?
Q. You were only asked about beans you have been shown?

The COURT: The beans you examined in 1894 and 1895.
WITNESS: I simply was handed a sample of the coffee beans; I don't know whether they were colored or not colored.

Q. Do you know where they were colored?
A. No, I do not.
Q. Did you ever ask Mr. Crossman?
A. No, sir.
Q. Whether he ever had them colored in New York?
A. No, sir; never saw Mr. Crossman.
Q. Then you never did see the beans until after the coloring matter was on them?
A. I couldn't say there was any coloring matter on these beans shown me here to-day. They look like the ordinary natural color so far as I can tell. So far as the beans shown me here to-day are concerned, I can't see any artificial color on them at all.

ADOLPH J. TILLMAN, a witnes- called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Fox:

I live in Baltimore. I have come here to testify in this case. I saw some of the samples of this Catania coffee in Baltimore. I shipped part of the samples on to Mr. Davison, afterwards I saw them here in his office here in New York. That bottle is one of the samples, one of the samples washed. I washed them. I rubbed them with a rag. When I said washed I meant rubbed with a rag.

44 By Mr. KELLOGG:
Q. Whom did you get this sample from?

A. The sample was shipped to us through the plaintiffs from New York.

Q. How do you know it was one of the Catania coffees?

A. Simply according to the very identical bag that the samples came in, here in court.

Q. You didn't draw this from the Catania yourself?

A. No, sir.

Q. From whom did you receive it?

A. Received it from Core & Herbert.

Q. In what manner did you receive it?

A. Received it by express in large bags.

Q. By express?

A. Yes.

Q. Was it delivered to you by messenger of Core & Herbert?

A. Delivered to us by the express company.

Q. Then your only method of knowing, as you claim, that it is one of the Catania coffees is simply that you received an express package from Core & Herbert containing this particular sample, is that right?

A. The plaintiffs gave an order to Core & Herbert, our representatives, that did such work as that for us here in the city, and they drew them and forwarded them by express to us.

Q. How do you know whether Core & Herbert drew them or not; were you there?

A. I was not, no sir.

Q. You were not there?

A. No, sir.

Q. How do you know whether Core & Herbert drew them or not?

A. They had orders to send us samples of that identical coffee.

Q. How do you know personally that these are samples which they drew from the Catania coffees?

A. Those are the samples they expressed us.

Q. And is that the only way in which you know it?

A. It is.

Mr. KELLOGG: We feel that there is no identification whatever of these samples. There is not the slightest objection on
45 the part of the plaintiffs in this case to the production before this jury, for we intend to do it ourselves if the defendants do not, of a properly identified sample of this coffee; but these attempts to get in coffees which are not properly identified are not proper, and cannot be permitted by us. If he will identify his sample there will be no objection. If the court please, we spent yesterday trying the case in a cart before the horse fashion; it seems to me the time for that has ceased, and I ask that the gentleman be compelled to produce his proof in a proper manner and not rely upon inference or suggestion.

The COURT: You will have to bring the man who drew the sample.

Mr. Fox: If you want to keep these coffees out, say so.

Mr. KELLOGG: We want these coffees to come in.
Mr. FOX: Those are the coffees.
Sample of coffee marked Defendants' Exhibit 4 for identification.

By Mr. FOX:

Q. Did you rub on a rag the coffee which is contained in bottle Exhibit 4 for identification?

Mr. KELLOGG: I object to any further questions concerning this coffee until it has been properly proven in evidence.
Mr. FOX: I shall identify the rag and we have got Mr. Harper who drew the samples in court, if that is the objection. I will identify the rag.

Q. Is this the rag with which you rubbed the coffee or some of the coffee which is contained in bottle Exhibit 4 for identificat-on?

Mr. KELLOGG: I object.
Objection overruled. Exception taken.

A. Yes.

Mr. FOX: I will offer this rag in evidence.
The COURT: Mark it for identification subject to being stricken out unless it is fully identified.

46 Rag marked Defendants' Exhibit 5 for identification.

Q. Now Mr. Tillman, about what time was it, what year was it?
A. 1894, the latter part.
Q. And then after you had shipped Exhibit No. 4 for identification to Mr. Davison, the attorney for the defendants, did you see that sample and others in his office?
A. I did, sir.

Mr. KELLOGG: I object to any further questions except those which should be properly asked here connecting this sample with the coffees in question.
The COURT: You will have to connect it.

GEORGE W. CROSSMAN, recalled on behalf of the defendants.

By Mr. FOX:

Q. You know that some of the samples of this coffee were sent on to Baltimore?
A. They were.
Q. Either by or through some of your firm?
A. They were.
Q. And do you know how many?
A. Not exactly.
Q. Can you give us an idea about how much?
A. A quarter to half a pound.
Q. What?
A. About a half a pound is the usual quantity.
Q. You don't know?

A. About half a pound of each chop.
Q. And from about how many chops was a sample sent on?
A. Oh, I think nine or ten.
Q. Who attended to that for you here in New York, what firm?
A. Core & Herbert, might have been; there are two firms here who attend to that business.
Q. What is the name of one?
A. William H. Force.
Q. Are Core & Herbert one?
A. Yes.
47 Q. Isn't your best recollection that Core & Herbert were the ones who sent on the samples on this occasion for you?
A. No; I have no idea on that.
Q. Who attended to that for you?
A. A young man in our employ attended to that.
Q. Is he in your employ now?
A. Yes, sir.
Q. What is his name?
A. Neilson.
Q. Is he in court?
A. No, sir.
Q. How do you know he attended to it?
A. It is his duty.
Q. You understood that he on behalf of the defendants sent through some one, probably Core & Herbert, some samples to the defendants in Baltimore, is that right?
A. On behalf of the defendants?
Q. No; to the defendants?
A. Yes; that is the usual course of procedure.
Q. How did Core & Herbert get the samples through your young man?
A. I don't know that Core & Herbert did get them.
Q. You understood that either through Core & Herbert or Force these samples were sent?
A. Yes, sir; those are the samples there.
Q. How did they get samples?
A. By an order.
Q. From whom?
A. Issued from us.
Q. You have no doubt have you, Mr. Crossman, that some one on behalf of your firm, some one, through either Core & Herbert or Force & Company, took a sample and sent it on to the defendants; you have no doubt about that have you?
A. I have no doubt but what samples were sent to them; just exactly how, I can't say.
Q. And that was done at what time, do you remember?
A. Immediately on the receipt of the samples after the arrival of the steamer.
Q. Will you instruct your young man to come up to court, or shall I have to subpœna him? Your counsel makes this objection,

so in some way we have got to prove this fact within the rules of evidence?

A. I have no objections whatever.

48 Q. Will you send for him?

A. Yes, certainly.

Q. Will you do so by telephone?

A. Yes.

The COURT: If you have those brokers here, Mr. Fox, it seems to me you can jump one step.

JOHN B. FROST, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Fox:

I have charge of shipping samples over at Roberts' stores of coffee. I know the firm of W. H. Crossman & Bro. I knew them in 1894.

Q. Did you get an order to take samples of Catania coffee, that is, coffee ex the steamship Catania, to be sent to the defendants?

A. I don't know whether it was their order, drawn by Crossman, or whether it was Lurman's order; I don't know.

Q. Did you take some samples and send them on to Lurman & Co.?

A. Samples were drawn, yes.

Q. And sent to the defendants in Baltimore?

A. Yes; expressed by us to them.

Q. Have you any papers in regard to that shipment?

A. Yes, sir; I have an order here.

Mr. KELLOGG: I submit this is a waste of time. I call your honor's attention to that stipulation. I am going to admit that the stipulation provides for the samples which ought to be produced before this jury.

Mr. FOX: These are the samples.

Mr. KELLOGG: Why don't you connect them with the samples mentioned in the stipulation?

Mr. FOX: All right.

Q. What papers have you now?

A. I have a copy of an order here; here is 18 chops here, samples sent on that order; they were expressed to T. G. Lurman & Co.

Q. Does that give the date?

A. Yes, sir.

49 Q. What is the date?

A. August 21st, 1894.

Mr. KELLOGG: These are samples sent to other parties.

Mr. FOX: Core & Herbert are people in New York who sent them to us.

Q. Now have you any other record of any other samples sent

through your firm for the plaintiffs Crossman & Bro., to the defendants?

A. No, sir, not that I know of.

Q. How can you tell what marks were on that coffee, you have got something W. H. C.?

A. I have got the marks W. H. C. with an L under, 120 to 130.

Q. W. H. C. stands for W. H. Crossman?

A. Yes. The other invoice is W. H. C. and Z under, 250 to 256.

Q. And any other?

A. That is all I know of.

Q. W. H. C. stands for what, W. H. Crossman, does it not?

A. Yes, sir, you can make it that way.

Q. Isn't that what you mean it?

A. Yes, sir.

Q. And what does the letter Z mean?

A. I don't know.

Q. Don't know whether that was a mark on values?

A. I don't know.

Q. Have you any record of sending any other samples at the request of Crossman & Bro. to the defendants at or about that time?

A. No, sir.

Q. I show you certain bags marked Core & Herbert, 103 Front St. with a stamp, Theodor G. Lurman & Co., and ask you if that is one of the bags in which you sent one of the samples just referred to?

A. That bag was marked in our Brooklyn office and given to the man to draw the sample.

Q. And then when the sample was drawn this is one of the bags in which the samples was sent—you mean it contained your mark on it?

A. It contains our mark.

Q. You have already said that you didn't send any other at that time. Are these bags bags of a kind that were used by your firm for the purpose of shipping coffees at that time?

A. Yes, sir; we have always used that style of bags.

Q. Three of these are complete and as to one the top is lacking, is that so?

A. That is the idea.

Mr. Fox: I offer these in evidence.

Mr. Kellogg: I object. I wish to call the court's attention again, and the jury's, to the fact that the stipulation covers this whole point. It is admitted certain samples were received by the defendants. Why don't you put one of the defendants on the stand and let him say that these samples were received, and that ends all questions. It is useless to attempt to put in suppositi-ous samples and distract the attention of the jury from the real points at issue. I object upon the ground that the stipulation covers the entire point, and that the proper method of proving any samples which this gentleman wishes to introduce is to identify certain samples, if he

has them, as being those received under the stipulation, and that ends it; there is no further question.

The COURT: I understand, if you will take the sample and put on some one who received it——

Mr. Fox: Mr. Tillman did, he is in the defendants' employ. Now we will prove by Mr. Tillman that these are the bags which the coffee came in.

Mr. KELLOGG: These are objected to as being inadmissible and irrelevant, and incompetent and immaterial.

Q. Right there, the first one, do you see a blue mark W. H. C.?

A. Yes.

Q. That is one of the marks put on by your house on shipping these coffees, is it not?

A. Yes.

Q. And stands for W. H. Crossman, does it?

A. Yes.

Q. And you see under the W. H. C. the letter Z corresponding to the letter Z in the record which you just produced?

51

A. Yes.

Q. Is there any mark showing any number?

A. Yes, 254 represents a chop of 38 bags.

Mr. Fox: I offer that in evidence.

Mr. KELLOGG: I object to it as irrelevant, incompetent and immaterial.

Objection overruled. Exception taken.

Sample bag admitted in evidence and marked Defendants' Exhibit 6.

Q. I show you this very paper and ask you if you see on that paper the letters in blue W. H. C. and ask you if they stand for W. H. Crossman & Co.?

A. Yes, sir.

Q. What letter do you see under that?

A. Z.

Q. Anything else?

A. Chop 253, 53 bags in a chop.

Mr. Fox: I offer that in evidence.

Same objection, ruling and exception.

Sample bag admitted in evidence and marked Defendants' Exhibit 7.

Q. Now I show you another one of your bags and ask you if you see W. H. C. and the letter Z on that?

A. Yes, sir.

Q. That represents the same thing as the corresponding letters on the other bags?

A. Yes, sir.

Q. Are there any figures there?

A. 251 chop, 54 bags in the chop.

Mr. Fox: I offer that in evidence.

Same objection by counsel for the plaintiffs. Same ruling and exception.

Sample bag admitted in evidence and marked Defendants' Exhibit 8.

Q. I call your attention to a mutilated bag and ask if you see the same letters W. H. C. and Z on there, and whether they represented the same as they represented on the other bags?

A. Yes, sir.

Q. Are there any figures there?

A. 252 is the chop, and 30 bags in the chop.

Mr. Fox: I offer that in evidence.

52 Same objection by counsel for the plaintiffs. Same ruling and exception.

Sample bag admitted in evidence and marked Defendants' Exhibit 9.

Q. On each one of these exhibits, Exhibits 6, 7, 8 and 9, do you find the name of the steamer from which the coffees were taken; if so, what is it?

A. There are two I can recognize, the steamer Catania; those two have been blurred; and I can't recognize the name of the vessel.

Q. And was each one of these shipments made in the usual and regular course of business employed by your firm in such matters?

A. They were all drawn together and expressed on to Baltimore.

Q. You know Crossman & Brother?

A. Yes, sir.

Q. Have done business off and on for them for a long time?

A. We have not done business for them; we have done business for other people through them.

Q. You mean you have had orders from them, from Crossman & Brother?

A. Yes.

Q. Running back about how many years?

A. I don't know.

Q. Prior to 1894, prior to this shipment, I mean?

A. Well, for the last ten years.

Q. Are your firm and the firm of Force & Company the official samplers for the coffee dealers here in New York?

A. Well, we are samplers.

Q. That is your regular business, sampling and shipping?

A. Yes, sir.

Q. You are the two principal firms in that business?

A. Yes, sir.

Cross examination by Mr. KELLOGG:

Q. Did you personally draw any of these samples from any bags, Mr. Frost?

A. No, sir.

Q. Were you present personally when any samples were drawn from any bags?

A. No, sir.

Q. Then your only knowledge or information about what
53 bags these samples came from was that somebody told you they were so drawn?

A. Nobody has told me.

Q. What is your information then as to where they came from?

A. We marked the bags and gave them to one of the samplers to draw them; he drew the samples.

Q. Do you know that he drew them from these bags? You were not present and you don't know anything about it from personal attendance?

A. Personally I don't know; no sir.

Mr. KELLOGG: I move the court to strike out the entire testimony of this witness; he knows nothing whatsoever about it; all having been shown to be purely hypothetical and entirely improper.

Motion denied. Exception taken.

ADOLPH J. TILLMAN recalled on behalf of the defendants.

Direct examination by Mr. Fox:

In 1894 I was connected with or employed by the defendants in Baltimore. It was part of my business to receive these coffees when they came on from New York. These bags that have been marked Exhibits 6, 7, 8, and 9, are the bags in which I saw the coffee in Baltimore. From some of these bags I took the sample which has been marked here Exhibit 4 for identification; an average sample of the very identical coffee which came out of those bags.

Q. These marks that are on this tag attached to Exhibit 4 for identification, who put those there?

A. One of the clerks in the office.

Q. You know his handwriting?

A. Yes, sir.

Mr. FOX: Now I offer that sample in evidence.

Mr. KELLOGG: I would like to cross-examine.

The COURT: Yes.

54 By Mr. KELLOGG:

Q. You say you were in the employ of whom?

A. The defendants.

Q. That purports to be a sample of coffees; is it in the same condition as when you received it?

A. No, sir.

Q. Does it have the same appearance as when you received it?

A. No, sir.

Q. Why did you rub it with a rag?

A. To find out the condition of the coffee.

Q. At the request of the defendants?
A. Yes, sir.
Q. Have you here any samples of the coffee in its original condition?
A. I have coffees of the original samples here in court.
Q. In exactly the same situation as when you received them?
A. No, they don't look the same on account of age.
Q. You say that they don't look the same?
A. No, sir.
Q. And they don't look the same as that sample there?
A. Of course not, no sir.
Q. Are those the only samples which you received, which the defendants received of any coffees which purported to have arrived on the Catania?
A. We received what they call the ship samples, the advance samples which come ahead on the steamer, the small samples just to tender the delivery.
Q. Are those parts of those samples?
A. Those are not.
Q. When did you get those samples?
A. These samples?
Q. Yes?
A. I can't give you the exact date, but received in the neighborhood of August, 1894, somewhere in that neighborhood.
Q. How long after the arrival of the ship?
A Probably a week; maybe not that long; I don't know.
Q. And were these the only samples which you received?
A. They were.

55 Mr. KELLOGG: I object to the introduction of this particular bottle of coffee for the reason that the witness admits that it does not appear the same as the samples which originally came to the defendants' firm.

Mr. FOX: The purpose of the offer is to prove that the yellow was rubbed off, and we will get out some with the yellow on, and then the jury can draw the inference which the law permits them to draw.

Objection overruled. Exception taken.

Exhibit 4 for identification admitted in evidence and marked Defendants' Exhibit 4.

I rubbed with a rag some of the coffee of this Catania shipment when it was in the same condition that it was when it reached the defendants. I have the rag with me, right here sir.

Mr. FOX: I offer the rag in evidence.

Mr. KELLOGG: No objection.

Exhibit 5 for identification admitted in evidence and marked Defendants' Exhibit 5.

The color of the substance with which the coffee beans were covered was yellow.

Q. Did you wash a sample?

A. There is the sample washed, yes. This bottle contains coffee of this shipment which I washed. I washed it with water. Just plain water.

Mr. Fox: I offer that in evidence.

By Mr. Kellogg: When did you wash this?

A. About the same time. Five years ago. I washed it by just pouring it into the basin and by pouring water in and shaking it up, and so on.

Q. So that it might have absorbed water in the process of washing?

Mr. Fox: That I object to as a conclusion, upon the ground it is a conclusion on a matter as to which his opinion is inadmissible. I asked him as to the facts. It is for the jury to draw the con-
56 clusion as to whether water would be absorbed by a bean or not.

The Court: Perhaps not.

I have been in the defendants' employ for twenty-one years and constantly handled coffees during that time. I am not a licensed grader, but I am an expert; I grade for the firm. Therefore I am familiar with the qualities of coffees as far as grading goes.

Q. You know that coffees have the power of absorbing water, do you not, coffee beans in a natural state?

A. Well, I am a grader, but as far as to tell whether coffee will absorb water and that sort of thing, I really don't know. I know that if coffee beans are exposed to water, whether it is rain or whether they are washed, they will swell, and that changes their appearance. These beans have been exposed, this sample here, to water by me. I dried them.

Mr. Fox: There is no question but what their appearance is changed.

Mr. Kellogg: I object to it as irrelevant, incompetent and immaterial. Objection overruled. Exception taken.

Bottle admitted in evidence and marked Defendants' Exhibit 10.

Mr. Kellogg: It is conceded by the defendants that Exhibit 10 of the defendants has been changed in appearance since its receipt by the defendants.

Mr. Fox: As the result of the washing——

Mr. Kellogg: As the result of washing which it has been subjected to.

Mr. Fox: At the hands of this witness.

Mr. Kellogg: At the hands of this witness.

The Court: With water.

Mr. Kellogg: With water.

By Mr. Fox:

Q. Do you remember what color the water assumed in which you

washed the coffee contained in the bottle now marked Ex-
57 hibit No. 10, if so, tell the jury.

A. I should call it a sort of mud color, or yellowish. Mud color is about as close as I can get it. A sort of a brick, reddish mud, I should say.

Cross examination by Mr. KELLOGG:

I received ship samples very shortly before the arrival of the vessel. I had samples in my possession on August 15th, about that time. Those were not these samples. These samples did not reach me until August 21st.

Q. Now on August 15th, your firm sent a telegram rejecting these goods, did they not, do you know?

A. Well, I can't answer those questions: I didn't go into the details of that.

Q. Don't you know that a telegram was sent on August 15th by your firm rejecting these goods?

A. I know that the goods were rejected, about that time. No question about that. My examination of these samples, the washing and the rubbing that I did, took place I think probably a couple of months after, maybe longer, I can't give you the exact date. Mr. Lurman being brought up before the exchange, and all those matters coming together, we made preparations, as far as I remember. Well, in fact, we knew that there was going to be trouble of the kind, and we prepared ourselves. We were preparing at that time for the trouble that we expected. This may have been, as I said, three months after that, the latter part of the year; I can't give you the exact date; anyhow it was sometime after this trouble began. I have performed the experiment of rubbing a Coffee Exchange standard No. 9 sample with a rag; it produces some little effect. It probably makes the rag appear dirty and smeared with dust and dirt. It gives the rag a slightly muddy appearance. When I came to the washing of these samples I did so with a rag on which water had been dampened. I took a little water in my hand and
58 rubbed it over the coffee with a rag slightly. As far as the rag goes that was all the washing they were submitted to. The other washing was just plain water in a bowl. I put those in the bowl and threw the pans backwards and forwards and rubbed them off, took them out of the water and put them on the register to dry. I filled the bowl with water as far as I could. That was the washing process. I have never washed natural coffees, as they have been styled, exchange standards, in water in the same manner. Those original ship samples were compared with the samples. I compared them with the samples that we received from Core & Herbert; they corresponded exactly, and they were all mixed together. They still exist mixed in with the Core & Herbert samples. At the present time I am positive that these samples of which I have been speaking are the ones received by Lurman & Co. from the Catania samples.

GUSTAVUS W. LEHMAN, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Fox:

I reside in Baltimore. I am 55 years old. My occupation a chemist. I have operated in the laboratory since 1866. I am the chemist of the board of health of the city of Baltimore and a chemist of the United States Government for the port of Baltimore. Have held the position of chemist to the United States Government at the port of Baltimore twenty-five years probably. I examined some of the samples of the Catania coffee. First I got the beans and then made an ocular examination. The ocular examination disclosed simply that they appeared to be covered with a dense opaque substance of a yellow color. Like yellow ochre. Before I went to the analysis proper, the chemical analysis, I used the microscope
59 to establish whether that foreign substance was really on the beans. By comparing it with other coffees I found that there was a great difference. Through the microscope those beans in question, the samples that I examined, were covered with an opaque yellow substance. In other words, I saw with the microscope what I saw with the naked eye, and some other things besides.

Q. But you saw with the naked eye you said this dense opaque substance?

A. Yes.

I scraped off some of this substance, with a spatula, a platinum or a horn spatula; I can't remember whether I took a platinum spatula or a horn spatula. And when I got it off I examined it. I examined it chemically for what it was. Its color was yellow. Then I subjected this yellow substance which I removed by the spatula to a chemical analysis as a preliminary examination. I found a basic ferric salt, containing all the elements of yellow ochre. That (showing bottle) has the appearance of yellow ochre. The same appearing substance as the substance which I got off the beans. I have analyzed some out of this bottle. I made a chemical analysis of part of the bottle. And the result was that it contained the same elements as the substance removed from the beans which I subjected to the chemical analysis to which I referred.

Bottle admitted in evidence and marked Defendants' Exhibit 11.

I treated a sample of the proper size in a regular course of analysis. I took a large sample, probably a pound of the coffee, and treated it with water and a very weak solution of hydrochloric acid, for the purpose of removing the coating. After I had removed this yellow coating, I examined the coffee beans. They looked entirely different, entirely different.

Q. Were there any defects which you then saw which you could not see until you had removed the yellow substance?

60 Mr. KELLOGG: I object. The witness has not qualified as an expert in coffees.

Q. Tell the jury some of the things that you could see, and did see in the coffee beans after you had removed this yellow substance?

Mr. KELLOGG: That I object to on the ground that the witness is not competent to testify as to coffees; he is competent to testify as to the chemical end of the question.

Mr. FOX: I am not asking him as an expert at all; but asking him as to a fact, what he saw.

Mr. KELLOGG: It is incompetent as to this witness.

The COURT: I am inclined to think he can state what he saw.

Exception taken by counsel for the plaintiffs.

A. Before I treated the samples at all they had a beautiful uniform appearance; there was a uniformity in the coffee as it came to the observation of my eye. After the process was done there were black and brown beans and yellow beans and light beans and all kinds of beans, and shriveled beans and everything else, and altogether a different appearance. I removed some of this coating by the spatula and some by the washing process to which I have referred. I also put the samples on glazed paper in our laboratory and mixed them up to get uniform the paper underneath, the glazed black paper; we used black paper as a rule, and it was covered with this here yellow substance. I made an analysis of natural coffee which was not discolored by any yellow substance. I did not find any yellow ochre in the analysis of the natural coffee.

Cross examination by Mr. KELLOGG:

This bottle of yellow ochre that has been submitted to the jury I do not mean to be understood that this came off the coffees that I examined. I have seen coloring matter on coffees before.

61 Quite frequently. It has been an uncommon thing. I was called at a preceding trial of this case, the first trial.

Q. Do you recollect this question being put to you and this answer being given: "Question. Do you mean this was not exceptional, or that it was exceptional thing in this particular instance to find coffee like this? Answer. I believe that it is not an exceptional thing." Is that right?

A. I have never seen the record since six years ago.

Q. Is that right?

A. If it is in print, I suppose it is.

Q. Is that right—is it correct now? Is that correct?

A. That may be correct from the view I had of the matter at the time.

Q. It is not correct now, is that what you mean?

A. In a certain way it may be correct.

Q. In what way is it incorrect?

A. It may be correct, only as I am called upon as a chemist—I am the chemist for the health department for the city of Baltimore; as such, under my jurisdiction, only cases of adulterated food, to what extent they are adulterated; I have not the slightest know-

edge of how I dealt with adulterated food in the course of chemical investigation.

Q. Did you understand me as having asked anything of that sort in my last question? Didn't you understand my question just a moment ago?

A. Yes.

Q. Won't you try to answer it exactly; did you or did you not testify to that in the first trial as I read in the record?

A. That is right.

Q. Is that or is it not true?

A. Perfectly correct.

Q. I ask for a categorical answer, yes or no?

A. Yes.

Q. That is correct, is it?

A. Yes.

Q. Were you asked the following questions: "And not an exceptional thing? A. No. Q. Is it a common thing? A. I
62 rather believe it is." Were you asked those questions, and did you give those answers?

A. Yes.

Mr. Fox: That is all under the same objection and exception.

Q. Is that true now?

A. That is right.

Q. There is no doubt about it, is there?

A. No, sir.

Q. Do you appreciate, Mr. Lehman, that there is some slight inconsistency between your testimony a moment ago and these questions and answers?

A. No, I do not.

Q. You don't appreciate that?

A. No, I took it in a different sense then.

Q. Is that your answer?

A. I didn't take it in the sense of a chemist.

Q. You took it in the sense of what, pray?

A. I took it probably more in a commercial sense.

Q. You thought you were being examined commercially, not as a chemist, is that right?

A. That is right.

Q. Do you think that now, do you suppose I am examining you commercially and not as a chemist?

A. No, only chemically.

Q. That is what you really think, is it?

A. Yes.

Q. And that is your answer, is it?

A. Yes, sir.

Q. Now, Mr. Lehman, what was the quantity of this oxide of iron—did you call it oxide of iron, by the way?

A. Oxide of iron.

Q. Is that the same thing?

A. Yes.

Q. You called it basic ferric salt?
A. And that is the more accurate name.
Q. What was the quantity of this basic ferric salt that you found on your examination, found in the samples?
A. To the best of my knowledge probably 500 milligrams I selected from the coffee.
Q. Can you explain that more in detail to the jury and myself; I don't know what a milligram is.
A. A milligram is a thousandth part of a grain.
63 Q. And there were 500 milligrams?
A. Yes, sir.
Q. On how much coffee?
A. 100 grammes of coffee.
Q. 100 grammes of coffee that had one-half of it washed?
A. Half a gramme on it.
Q. This basic ferric salt—are you testifying as to quantity from certain recollections, by the way, or are you merely guessing at it?
A. My recollection at the time.
Q. That is all distinct recollection, is it—this yellow ochre here as we look at it is absolutely opaque, is it not? in this bottle?
A. Yes, sir.
Q. Can't see through it at all can you? Is yellow ochre opaque always, no matter how little of it is used and how thin it may be spread on any surface?
A. Chemically——
Q. Yes or no?
A. May I answer it——
Q. Yes or no?
A. Yellow ochre is always under all circumstances considered an opaque substance.
Q. Is an opaque substance?
A. Yes, sir.
Q. By opaque do you mean that it never allows any light to go through at all?
A. I don't mean to say that at all.
Q. What do you mean by opaque? Let us have your meaning very clearly on that?
A. Opaque is a substance that does not transmit light, has the physical quality of not transmitting light.
Q. Is it not the fact that a substance can be quite opaque and yet transmit some light?
A. Physically every substance, even iron, can be put in such minute shape that it can transmit light.
Q. Then it depends upon the quantity, does it not?
A. It depends upon the quantity.
Q. Now, applying that test to these particular beans, Mr. Lehman, do you mean to have this jury understand that the quantity
64 of this substance which was on these coffee beans was sufficient so that no light at all could pass through?
A. Yes, sir.

Q. No light at all?
A. No light at all.
Q. And you could not get any idea of what was underneath that substance?
A. Not the slightest.
Q. That is absolute is it?
A. That is absolute.
Q. So that if there were any black beans in that coffee they would be colored just the same color as other beans which were not black, would they?
A. Possibly so.
Q. I am talking about what you saw; were they?
A. I did not see them before I washed them.
Q. Do you mean to say now that you did not see any beans which were of the kind known as black beans in this coffee before you washed it?
A. No.
Q. Will you swear to that?
A. Yes, sir.
Q. No black beans?
A. Not to the general appearance.
Q. What do you mean by that?
A. There might have been a slight difference in the color; the beans were of a more uniform character.
Q. How could that have been if this substance covered up the color entirely so you could not see through it at all?
A. How would what be?
The COURT: The difference in color in the bean?
The WITNESS: In manipulating a substance for the purpose of coloring it with another substance it is hardly possible to do that in such a way so that every bean will look precisely as the other.
Q. In this particular case had this coffee been so manipulated as you call it, that every bean looked precisely like the others?
A. I don't think so.
Q. Is it not the fact that it was not entirely uniform in color?
A. It was only in general appearance uniform in color.
Q. Now, Mr. Lehman, was it uniform or wasn't it uniform?
A. It was uniform in color.
65 Q. Then there could not be differences in color, could there, if it was uniform in color?
A. There have been different shades.
Q. Then it was not uniform if there were differences?
A. It was not quite uniform.
Q. Then it was not quite uniform?
A. Naturally.
Q. That is clear isn't it, at least?
A. Yes, sir.
Q. What was the difference in the uniformity that you noticed before you removed this stuff, as you call it?
A. There was a vast difference.

Q. I am talking about before you removed the stuff?
A. And after?
Q. No, no, you misunderstood me. I am talking about the appearance of the coffee before you removed the stuff at all; I am asking you what difference there was between different parts of that same coffee before you had removed any of this stuff?
A. A little difference, to the best of my memory.
Q. So that no beans looked black at all?
A. Well, not from a distance.
Q. What do you mean by a distance?
A. I didn't examine every bean.
Q. Did you take any as near as my hand is now, about a foot from your eye?
A. Yes, sir.
Q. From that distance you couldn't tell that some beans were blacker than others?
A. There might have been a certain shade of difference.
Q. Was there a certain shade of difference?
A. Yes, sir.
Q. So that you could have told that some beans were blacker than others?
A. Yes, sir.
Q. Before you removed the stuff?
A. Yes, sir.
Q. What other differences in color were there in the coffee beside black beans that you have spoken of, any others?
A. I don't know, not until after I washed it.
Q. Then you found differences in the color, did you?
A. Yes, sir.
66 Q. In the various parts of the same coffee?
A. Yes, sir.
Q. None of which differences you could have detected at all before, is that right?
A. Yes, sir.
Q. And by the exercise of your ordinary power of eyesight?
A. Yes, sir.
Q. Now, Mr. Lehman, where are those samples that you had?
A. The samples I returned after I finished them to the office where they came from.
Q. Have you got any of them here?
A. No, except a few small beans.
Q. Have you got any fair portion of the sample that you had?
A. No, sir.
Q. Have you seen any of them since you came here to New York this time?
A. No, sir.
Q. Do you know who you returned them to personally?
A. The firm that employed me.
Q. That is?
A. Lurman & Company. I have never become a licensed coffee

grader. I have not passed upon the qualities of coffee. Never examined coffee to find out what defects it contained, entirely aside from such questions as we have been discussing. I know nothing about coffee except chemically. I could not put a grade on coffee by looking at it. I couldn't tell whether it was defective coffee or not by looking at it.

Q. At the last trial of this case when you were called do you recollect being asked the following questions and giving the following answers:

"Q. Do you know anything about the kind of defects that are found in coffees which are imported from Brazil? A. No, sir." Is that right?

A. That is right.

Q. "Q. Do you know anything about the value of coffees? A. No, sir."

A. That is right.

Q. "Q. You say, if I correctly understood you, there were from three to possibly eight ounces of this coloring matter per bag
67 of the coffee treated? A. Yes, sir, I said so." Three to eight ounces per bag, is that right?

A. Yes, sir.

Q. "Q. Did you make a computation, a quantitive computation showing how much of this matter was in each bag of coffee? A. I did not."

A. No, sir.

Q. Could you give at the present time any figures which will show that with accuracy about how much there was per bag of the samples that you analyzed?

A. I couldn't do it. I wasn't asked to do it.

Q. "Q. You can't tell whether three ounces or eight ounces? A. No, sir." Is that right?

A. That is right.

Q. A few moments ago you spoke of so many milligrams per gramme or per 50 grammes. You stated, if I understood you correctly, that was based upon your distinct recollection of the figures at the time. Will you explain that, please?

A. We chemists can tell very closely about how much it is; to the best of my recollection now the quantity of the basic ferric salt might have been 500 milligrams, might have been only 400; I won't be positive at all as to that.

Q. Should you say it was a very close estimate of quantity when you can't tell whether it was three ounces or eight ounces per bag; do you call that close?

A. Yes, sir.

Q. That is close?

A. That is close.

Q. You would consider that if you were asked to make a quantitive analysis as an accurate result when you can't tell whether it was between three and eight ounces per bag?

A. I was not asked to make that.

Q. I asked you whether you would consider that a close result if you had been so asked?

A. No, sir.

Q. Then your answers as to quantity are not close?

A. No, sir.

Q. If I understood you correctly, you have said that the coloring matter on the outside before you treated the coffee at all was
68 visible to the naked eye, is that right?

A. Yes, sir. I did not have to remove it to find out there was a coloring matter there. That is not the color of any portion of the bean in its natural condition so far as I know. Natural coffee does not look the color which this particular coffee had.

Re-direct examination by Mr. Fox:

Q. I show you Exhibit A, sealed April 29th, 1900, containing certain coffee beans which Mr. Crossman identified yesterday as what he would call damaged beans. Just take them out in your hand, please. Did you find beans of that general kind in the samples that you examine- after you removed this coloring matter?

A. Yes, sir.

By Mr. KELLOGG: You are referring to these black beans that Mr. Crossman pointed out yesterday?

A. Yes.

Mr. FOX: They are black and pale both.

Q. You don't know anything about damaged beans anyway do you, one way or the other?

A. No, sir; I don't know anything about damaged beans.

Mr. FOX: I read in evidence from the testimony given by Mr. Crossman, the plaintiff, upon the former trial:

"I cannot state the exact nature of the coloring matter or the substance with which the two hundred odd bags out of the two hundred and fifty number 9's was colored."

Now I ask to read the sentence beginning, "He Mr. Jouet," through that sentence.

By Mr. KELLOGG: That is objected to, Mr. Jouet being his own witness and the matter being irrelevant, incompetent and immaterial.

The COURT: That objection is sustained. I think that fact in that last paragraph appeared on your examination.

69 Mr. FOX: I think so too. If it was, the objection is hardly worth taking.

The COURT: I am quite sure.

Mr. FOX: Your honor does not understand me as assenting to the fact that I did it. I ask to read it now, in order to be sure that it is in the case. If it is in the case there can be no harm in reading it now; if it is not, then I ought to have the opportunity of putting it in. If your honor in ruling will be kind enough to indicate if you

should sustain it upon the ground the evidence is already in or not, I shall be obliged.

The COURT: I see no objection to it as a fact.

Mr. KELLOGG: We except.

Mr. FOX: I read also from the testimony of Mr. Crossman, the plaintiff, given on the last trial:

"He, Mr. Jouet, was called as a witness on our behalf on the first trial, and I think it very likely that we saw him before he testified."

Now I read, Mr. Kellogg, from the testimony of your client, one of the plaintiffs, Mr. Crossman:

"I did learn that these coffees were artificially colored. We had twenty-eight thousand bags of coffee on the Catania. I admit that there were in that cargo fifteen or sixteen hundred bags of artificially colored coffee. I heard of it when Mr. Lurman objected to take it on that ground."

Defendants rest.

THEODOR G. LURMAN, one of the defendants called on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct-examination by Mr. KELLOGG:

I am one of the defendants in this action. I reside in Baltimore. I am a member of the Coffee Exchange of the City of New York. I joined it in 1883.

70 Q. Did you subscribe to its by-laws and its charter at the time you joined it?

Objected to. Objection sustained.

Mr. KELLOGG: I except.

Mr. FOX: The objection is that it is irrelevant and not rebuttal.

Q. Are you familiar with the form of contract on which this coffee was sold?

Mr. FOX: I object to that as irrelevant and not rebuttal.

Mr. KELLOGG: I wish to show the exact situation of the parties and what actions took place at or about the time that this controversy took place as bearing upon the good faith of the claim that this coffee was adulterated.

Mr. FOX: I make the same objection.

The COURT: Same ruling and exception.

My firm received first samples of this coffee in August, 1894. I have a memorandum. It is a matter of record. I can look at my memorandum and tell you the exact date. I think it was the 15th, but I could not state exactly the date. It was in August, 1895; it was a matter of record. The samples were received by Lawrence & Crane; they notified me that they had received the samples from the brokers in New York, L. W. Minford & Co. I personally saw the samples. Shortly after the ten bags in which they were received were opened.

The same morning that they were received I examined them myself. I looked at them. I found a lot of painted coffee.

Q. With this substance of yellow ochre on it, was it not?

A. I don't know anything about the substance. I can tell the general way the color was. I don't know what the substance was.

Q. Well, there was a substance on it, was there not?

A. It certainly was a foreign substance.

71 Q. A foreign substance on the coffee?

A. Yes, sir.

Q. No question about that?

A. No.

Q. Was that on all the coffee, or a part of it?

A. On a portion of the coffee.

Q. Five chops, was it not, out of some thirteen?

A. About five, yes; it was about 210 bags, 200 bags, more than 200 bags.

Q. Out of a total of 500; is that right?

A. Yes.

Q. You looked at these samples of coffee yourself, did you not?

A. I did.

Q. What did you see? You saw, you say, painted coffee; what else?

A. I saw a lot of painted coffee.

Q. What sort of coffee was it that was painted? What kind of coffee was it, so far as quality was concerned?

Mr. Fox: That I object to as not rebuttal.

A. I couldn't tell accurately as to what kind of coffee it was through the paint; I couldn't tell accurately what kind of coffee it was through the paint.

Q. You couldn't tell accurately; does that mean you couldn't tell at all?

Mr. Fox: How is that rebuttal? If your honor thinks it is rebuttal, I will not press the objection.

The Court: Very well; he may answer.

A. In a vague way I could tell.

Q. What could you tell in a vague way?

A. That it was painted coffee.

Q. Do you really misunderstand my question, Mr. Lurman? I am asking you about the quality of the coffee that was painted. Don't you quite understand me?

A. Will you be kind enough just to repeat that question; how did you put it?

Q. What did you see as to the quality of the coffee that was painted?

A. It was a low grade coffee.

Q. A low grade coffee?

A. Yes.

Q. What do you mean by that; will you interpret a little more clearly?

72 A. Coffee approaching number 9 grade; it was not a high grade number 1 coffee, as a perfect coffee is supposed to be, number 1. Number 1 is supposed to be perfect coffee. Number 9 is the lowest grade.

Q. That is, the lowest exchange grade?

A. Yes, sir.

Q. That was then recognized.

A. That was then recognized.

Q. What is it that m-kes the difference between those two grades of coffee in quality?

A. The difference is the number 9 coffee contains damaged beans.

Q. Of what nature?

Mr. Fox: One minute you ask a question, Mr. Kellogg, I don't think you appreciate it to give the difference; and the moment he described number 9 coffee, you put another question. I submit he should be allowed to answer that question.

Mr. KELLOGG: I should be pleased to hear his entire answer.

Q. Go ahead, if you were going to say anything more?

A. No. 1 coffee is comparatively and almost entirely free of damaged beans; you may say free of damaged beans.

Q. And by free of damaged beans, what kind of beans do you mean; such as Mr. Crossman picked out yesterday?

A. I should like to see those beans.

Q. What do you mean by damaged beans? I will put it in that way?

A. I mean by damaged beans, black beans, withered beans, sour beans, swollen beans and pale beans.

Q. Musty beans?

A. Well yes, musty beans.

Q. Little sticks?

A. No, I wouldn't call a stick a bean.

Q. Little sticks?

A. I wouldn't call a stick a bean, but that is an imperfection.

Q. Well, an imperfection?

A. Yes, an imperfection.

73 Q. It is an imperfection which is contained in low grade coffee, is it not, a little stick in it?

A. Yes, a little stick is an imperfection.

Q. And little stones, or other imperfections, are there sometimes?

A. Yes, sir, little stones too.

Q. And dirt of one kind and another, either in chunks or not, is that an imperfection also?

A. Yes.

Q. And what are known as hulls, that is, the shell of a bean, the outside?

A. Yes, sir; that is an imperfection.

Q. You would call that a damaged bean, wouldn't you?

A. No, I wouldn't call that a damaged bean.
Q. Then you would call a defect also a damage?
A. Well, an imperfection, yes, sir.
Q. It is the presence of imperfections such as have been mentioned, and any others, if there were other imperfections, which makes the difference in grades? Is it the presence of these imperfections which makes the difference in the grade?
A. Yes, sir.
Q. And damaged beans, whether you called it an imperfection or a damaged bean, that is what makes the difference between nine and one, and eight and seven, etc.?
A. Yes, sir.
Q. The lower grades have more of those imperfections, more damaged beans than the upper grades, of course?
A. Yes, sir.
Q. When you examined these samples you saw that these coffees were of a low grade, nines, did you not?
A. Not accurately.
Q. I don't mean accurately, but roughly approaching nine?
A. In a general way I could see that they were nines, but not accurately.
Q. That means that you saw in a general way that there were present imperfections of one kind or another, does it?
A. Well, I saw—I had bought nines; and I suspected, seeing this coffee painted—I didn't expect to get better coffee than I
74 bought, and I therefore took it for granted that they had painted this coffee, and that it was, as I could not see all the imperfections in it—I took it for granted that it was a lower grade than nines.
Q. Did you see any imperfections at all Mr. Lurman, in the coffee when you examined it vaguely or otherwise?
A. I saw some imperfectly.
Q. What did you see imperfectly?
A. I saw a black bean covered with paint.
Q. Then you saw the black bean with the coloring of paint over it, if I understand you correctly?
A. Had a good deal of paint on it.
Q. But nevertheless you could see it was a black bean?
A. I knew it was a black bean from my technical knowledge; but it was not black; it was covered over with yellow.
Q. Do you mean to say it was not black at all?
A. No, it was not black.
Q. Was it darker than the other beans which are covered with yellow?
A. It was not exactly the same color as what I supposed to be the good portion of the coffee, but it was yellow nevertheless.
Q. How do you know it was a black bean unless you could see it was a different color underneath from the other coffee?
A. From my technical knowledge.
Q. What do you mean by that?

A. I suspected that it was a black bean.
Q. How did you suspect, Mr. Lurman, if you couldn't see?
A. Because I picked up a bean and rubbed the paint off.
Q. Do you mean to say that you did not see any black beans at all until you rubbed the bean off, paint off?
A. No, I didn't see black beans; I saw black beans covered with paint.
Q. After you rubbed the paint off?
A. Black beans—from my technical knowledge I know
75 that those were black beans, but they were covered with this paint or ochre, whatever this stuff was.
Q. How did you know that they were black beans before you rubbed the paint off, what is the technical knowledge that you speak of?
A. For the simple reason that the beans, the black beans were not exactly the same color as other beans; there was a slight variation in shade, but they were black beans covered over with paint.
Q. So that there was a variation in shade?
A. Yes.
Q. There is no question about that, is there?
A. Yes, a slight variation in shade.
Q. And you could tell that they were black beans from your technical knowledge without rubbing the paint off?

Mr. Fox: This is objected to as irrelevant and not rebuttal as to whether his technical knowledge could detect it or not. The question I should suggest that your honor would see in the end is not what this coffee actually was, but whether there was as a matter of fact in this coffee a damaged bean, or whether there were damaged beans, or whether there was damage in the beans which damage was concealed by the substance which was put over the coffee, if it was.

The Court: Then as the court understands, you are willing to concede that in every other respect except as regards this coloring and its effect as infringing the public food act, the coffee was all right?

Mr. Fox: No, because we claim that not only under the pure food act but at common law, we were not obliged to take coffee over which there was superimposed a chemical substance. Under this contract we bought natural coffee.

The Court: Then I will permit the counsel to show what the coffee actually was.

Mr. Fox: The question as Mr. Davidson suggests, which
76 this witness is now asked to answer, is a question involving the use of his technical knowledge.

The Court: Well, that is all right. His technical knowledge is as good as any one else's.

Mr. Fox: That may be, and maybe better. That don't change the view I wanted to present to your honor.

The Court: Then from his technical knowledge he makes a very good witness to show what the coffee actually was, because he saw it and examined it, and rubbed it, and scraped it, for all I know.

Mr. Fox: We will take an exception.

The Court: If you will eliminate the other part of it so that the question to be submitted to the jury will be what I understood you to say was the question. I want that plainly understood, that this coffee complied with the contract in all essentials except that it was painted in inhibition of the statute.

Mr. Davison: Except that it had the yellow stuff on it.

The Court: And against the provisions of the statute.

Mr. Davison: And against, as we claim, the contract too.

The Court: Well, the contract, so far as the coloring is concerned.

Mr. Fox: That is it. In other words, in regard to the question of fact we agree entirely.

The Court: That makes no difference, because the greater includes the less. If it was painted coffee, and against the provisions of the statute, that ends it.

Mr. Kellogg: Certainly.

The Court: Because then it follows naturally that it did not comply with the terms of the contract; so there is no reason for skirmishing all around this.

77 Mr. Fox: I wanted to say to your honor that there was a conclusion of law, not a statement of fact, which we did not wish to waive the right to ask your honor to draw, that if there never had been any pure food statute, still this fact, which is the same fact, justified and compelled the same conclusion of law.

The Court: It still makes not the slightest difference, Mr. Fox, for the one includes the other.

Mr. Fox: That is what we understand to be the defense.

The Court: I don't see why Mr. Kellogg should not understand it, and why he did not abandon all this, and go right to the issues of the case. Because I understand now the defense concedes just as the court has stated it, that that is the issue.

Q. Now, Mr. Lurman, immediately after your examination of the coffee, did you send a telegram of which I hand you a copy.

A. Mr. Kellogg, may I ask one question?

Q. I think not at present, Mr. Lurman.

A. In regard to my testimony. You have asked me what I did in a few seconds, when I first examined the coffee. Am I testifying to what I found out about the coffee taking sufficient time to look at it, or just glancing at it?

Q. I don't know, I am sure.

A. You asked me what I did when I first saw it.

Q. When did you see the facts which you have testified to, when were they ascertained by you?

A. The facts that I have stated now were on the first glance if I am to testify as to what I found out after careful and long examination——

Q. No, no, I didn't ask that. That means the first glance what you have testified to, does it?

A. Yes.

Q. After that first glance, Mr. Lurman, did you sent to the plaintiffs a telegram, of which I hand you a copy?

Mr. Fox: That is objected to as not rebuttal.

(Telegram shown to the court. Printed on page 141 of appendix folio 564.)

78 Mr. Fox: The objection is that it is irrelevant and not rebuttal.

The Court: I see no relevancy to this.

Mr. Kellogg: I wish to get in the correspondence that took place between the parties as bearing on the good faith of this rejection under the claim that it was a statutory matter. The question whether this defense is interposed in good faith is one of the points which the jury will have to consider.

The Court: Oh no, I think not. I think that is immaterial. I will sustain the objection. I will rule that out.

(Exception taken by counsel for the plaintiff-.)

Q. I will ask whether in response to your rejection of the coffees, the plaintiffs did not take the position that it was for the graders to pass upon the coffee, and not for you or for them?

Mr. Fox: I object to that as not the best evidence, as a conclusion, and irrelevant and not rebuttal.

(Objection sustained. Exception taken.)

Q. I will ask whether you did not receive on or about August 15th, a telegram of which I hand you a copy here, from the plaintiffs?

Printed on page 143 folio 572.

Mr. Fox: I make the same objection, and upon the further ground the declarations of the plaintiffs are irrelevant and inadmissible to bind the defendants.

(Objection sustained. Exception taken.)

Paper marked Plaintiffs' Exhibits 8 and 9 for identification.

Q. Is it a fact, Mr. Lurman, that you refused to appoint any graders at all to pass upon the quality of this coffee, as to whether it was adulterated or not?

Mr. Fox: I make the same objection.

(Objection sustained. Exception taken.)

Mr. Kellogg: It all bears upon the question of good faith. I should like to be able to show exactly the positions that the

79 two parties adopted in order to show the jury in what way this claim was first interposed, and what the real essence of the claim is, so far as good faith is concerned.

The Court: It would be under certain circumstances a very material consideration; but in view of the two prior trials of this case, it having been twice to the appellate division, in view of the stipulations now existing and in view of the evidence that was given in chief by the plaintiffs, and the defense that was interposed by

the testimony on behalf of the defendant-, I do not think the issue of good faith of the rejection of the coffee is in it at all.

Mr. KELLOGG: I take an exception.

The COURT: I have no desire to do anything but to get the real question at issue, as the parties believe the question to be before this jury for decision in the simplest and most easily understood method practicable.

Mr. KELLOGG: In that we heartily join.

The COURT: Let us go right ahead. Bring up those experts of yours.

Q. Now, Mr. Lurman, when did you first take the position that this coffee was adulterated within the meaning of the New York statute?

Mr. FOX: I submit that is irrelevant and not rebuttal, and my friend has all the exceptions which he is entitled to.

(Objection sustained. Exception taken.)

Mr. KELLOGG: I think this bears directly on what we are talking about.

The COURT: You are talking about the time that they took this position before?

Mr. KELLOGG: Yes.

The COURT: I don't think that is material.

Mr. KELLOGG: They are now defending directly upon the statute.

The COURT: I know they are, and that is the question I
80 am going to submit to the jury. That defense if it is outside the pleadings or stipulations, the appellate court must take care of it, I am going to confine it to just that issue. I have sort of driven Mr. Fox into assenting to it.

Mr. KELLOGG: This would not have been necessary if your honor had limited Mr. Fox in his own case; but he went all over the entire ground; that was the trouble before.

The COURT: He has rendered all that testimony of no utility whatever by now confining the issue to just that one question.

Q. I want you to look at this pan of coffee that I hand you, and which is No. Z. 251, and tell me whether that coffee — of the same quality as far as color is concerned, as the sample which you examined, or not?

Mr. FOX: That I object to as irrelevant so far as quality is concerned.

Q. Will you kindly glance at that coffee, Mr. Lurman, and tell me whether it is of the same color as the sample you examined and rejected?

A. No.

Q. In what respect does it differ?

A. The Catania coffee, the coffee in question, had a great deal more paint on it.

Q. Has that coffee got paint on it?

A. It has a little, I think.

Q. Rub some off, won't you, and satisfy yourself on that point?
A. Do you want me to take a good handful?
Q. Good or bad handful, whichever you will; I simply wish you to be sure. You need not rub it on your handkerchief unless you wish. I want your impartial judgment on it.

(Witness does so.)

By Mr. Fox:

Q. Is there anything on your hand?
A. There is a little on my hand.

By Mr. Kellogg:

Q. Does it appear to your expert eye to be the same kind
81 of paint as you have called it, that was on the Catania coffee?
A. I don't think that that coffee—it seems entirely different from the Catania coffee.
Q. In what respects, if you please,
A. The Catania coffee was more evenly covered over. It was a more uniform shade.
Q. Isn't that a uniform shade?
A. No.
Q. And therefore you are positive that it is not Catania coffee?
A. I don't say it is not Catania coffee.
Q. Let us have what you will testify Mr. Lurman?
A. I am positive that this does not look like the Catania coffee the sample of the Catania coffee.
Q. That you examined?
A. Which I examined; the colored portion does not look like it in its present condition.
Q. You are positive it does not look like the Catania coffee you examined.
A. Yes, sir, in its present condition, the condition that it is in there.
Q. Now Mr. Lurman, where are the samples of coffee that you did examine?
A. Where are they now?
Q. Yes.
A. Some of them there. (Indicating.)
Q. Let us see them; please look at this and tell me what that is? (Handing bag.)
A. That coffee has a little paint on it.
Q. What is that; describe it? Is it Catania coffee that you examined before?
A. It is so marked, yes, sir.
Q. Look at it please, and satisfy yourself about it.
A. Yes, sir.
Q. You identify that as a sample of the Catania coffee that you examined?
A. No.

Q. Do you know what that bag produced by your counsel is; if so, will you state? If you don't know, please say so?

A. Yes, sir; a sample of the coffee, and it has been reopened after six years.

Q. Is that a sample of the samples that you originally examined of this coffee?

A. Yes.

82 Q. And it has been for six years in your custody, has it?

A. Yes.

Bag marked Plaintiffs' Exhibit AA for identification.

Mr. Fox: A paper that is not in evidence cannot be shown to anybody; am I right, your honor? After it is admitted in evidence, it is before the court.

Mr. Kellogg: Now we will offer it in evidence.

Plaintiffs' Exhibit AA for identification admitted in evidence and marked Plaintiffs' Exhibit AA.

Q. I ask the jury to look at it, and to pass it around from man to man. Now Mr. Lurman, look at this sample and tell the jury, please, whether there is any difficulty in picking out a black bean from that sample?

Mr. Fox: I object to that as irrelevant and not rebuttal, and that the coffee is not now in the same condition as to paint that it was six years ago.

The Court: I hardly see what it tends to prove.

Mr. Kellogg: Showing the quality of the coffee, the exact point as to the statutory claim that my friends are making. The witness has testified as to this question in ascertaining through the paint what the quality of the coffee underneath was.

Q. Will you tell me whether there is any difficulty in picking out a black bean from that coffee?

A. I don't know whether I can pick out all of the black beans.

Q. Can't you pick out a lot of them?

A. I can pick out black beans, but I don't know whether I can pick out every damaged bean.

Q. Don't you think you better wait until I ask you to pick out other damaged beans? Can you pick out any black beans there?

A. Oh, yes.

Q. Is there any difficulty about it?

A. Not the same difficulty that there was, now.

Q. What was done with this sample after you took it, and where has it been ever since, so far as you know? What became of this sample after you got it?

83 A. The sample which was received from Core & Herbert was put in a box, the box nailed up. There were some 80 or 90 pounds of the sample of the coffee that was sent to us, and they were kept and retained in this box.

Q. You mean the bags were put in the box and the box nailed up?

A. The bags were put in the box; there was I suppose of the colored coffee, there must have been 30 or 40 pounds.

Q. Was it in the bags?

A. The samples were in the bags, and the bags were in a large deal box.

Q. Which was nailed up?

A. Yes.

Q. Where was the box put?

A. In my office.

Q. Where, in Baltimore?

A. Yes. It stayed there several years. I think those samples were sent here a year ago.

Q. Sent here a year ago?

A. Yes, I think the trial was in January.

Q. And to whom were they sent a year ago?

A. They were sent to Mr. Charles Stewart Davison.

Q. Were they sent in the same box in which they had been?

A. No.

Q. Another box?

A. Yes sir.

Q. Or how were they sent?

A. They were not sent in a large deal box. They were put in this box (indicating).

Q. Sent there by express to Mr. Davison?

A. I don't remember whether they were sent by express or whether they were brought here.

Q. Have they been in his custody ever since?

A. Yes.

Q. So far as you know. When did you see them next?

A. That particular sample?

Q. Yes.

A. Now I don't know whether it was that particular sample, but I have looked at the whole of this coffee so often in my own office and his office, and at other samples there to show him, that
84 I couldn't tell you exactly when I saw that particular sample; but I probably saw that sample within a month.

Q. Within a month?

A. I imagine so.

Q. Have you got any more samples of the Catania coffee that were painted at present here?

A. Yes, I think so.

Q. Will you produce them?

A. Mr. Davison has them.

Q. Please look at this bag which I show you and tell me what that is?

A. That is W. H. C. Z No. 255, 34 bags ex Catania.

Q. That means that this is a sample of that particular chop which came in the Catania, is it?

A. It is.

Q. Just look at it and satisfy yourself that there is no doubt about the fact, please?

A. That is it, I am satisfied.

Mr. KELLOGG: I offer it in evidence.

Sample identified by the witness admitted in evidence and marked Plaintiffs' Exhibit BB.

Q. Please look at these three bags which I hand you and tell me what those are?

A. Those are W. H. C. Z. No. 253, 53 bags ex Catania; W. H. C. Z. 252, 31 bags ex Catania; and W. H. C. Z. 251, 34 bags, ex Catania. Meaning that those three bags are samples of the other three chops which were claimed to be colored. Three more chops which were claimed to be colored, of this particular coffee.

Samples identified by the witness admitted in evidence and marked Plaintiffs' Exhibits CC, DD, and EE.

Q. Is it, or is it not, a matter of any difficulty for you to pick out black beans from any of those samples?

A. Is there now?

Q. Is there now? I should like to know whether you have any difficulty in picking out black beans from those samples?

85 A. I can see some black beans with a little coloring matter on. It is a little coloring matter on, just a little.

Q. Now, about that is there any doubt about a little coloring matter, you can tell they are black beans without the slightest difficulty, can't you?

A. I can see some black beans.

Q. You can very well see through, when you are only looking at the top can you?

A. I didn't mean that.

Q. Are there any little sticks or hulls?

A. I would like to have a pan; I can tell better; I don't see any sticks right on top.

Mr. FOX: What is the use of going into the sticks and stones?

Mr. KELLOGG: If there is no claim as to sticks and stones we won't go into it.

Q. So far as that is concerned you have no difficulty?

A. Just the black beans?

Q. Just the black beans?

A. Nothing else?

Q. Yes. Do you have any difficulty in picking out black beans from these samples now?

A. Black beans?

Q. Black beans?

A. I see some black beans with a little yellow on, very little yellow, not much. All of these five samples in the same box have been in that same place as the first sample; they have been handled more or less.

Q. Doubtless.
A. They have been handled.
Q. Where have they been and what has been done with them?
A. They have been examined off and on.
Q. And where have they been?
A. They have been in Mr. Davison's office. They came from my office. They were put in this box, poured out of the bags after having been there for a number of years in a hot office where there was steam heat, and they were exposed of course to more or less heat there, and they have been more or less handled.

86 Q. They were in this deal box in your office until they were sent to New York?

A. Yes sir; for a number of years.
Q. Are those five numbers all of the samples of the colored coffees which were objected to; were there more than five chops which were objected to?
A. I would have to look at my notes.
Q. I wish you would be sure about that.
Q. Are those the only samples of colored coffees which you have?
A. I can only tell by referring to notes.
Q. I would be glad to have you do so.
A. If Mr. Tillman will be kind enough to give me the paper I can tell you exactly the number of chops that were colored. You have the paper in your pocket, I think. That is it. Shall I read the marks and numbers?
Q. Just look it over and tell me whether there are any other samples here in court?

Mr. Fox: We can tell you that.
Mr. Kellogg: Why don't you?
Witness: You have got a sample of which we have got some here in court; I think there were some more down in the office.
Mr. Fox: I don't think these cover all the chops of the colored coffee, but these are all we have got in court.

Q. Never mind, Mr. Lurman, the question is answered.
Mr. Lurman, did you previously to this controversy with Crossman deal in adulterated or colored coffees?

Mr. Fox: I submit that it is irrelevant, not rebuttal and nothing whatever to do with this case.
Objection sustained. Exception taken.

Q. I should also like to ask for the purpose of having it upon the record, whether previous to this transaction, six years ago,

87 you had powdering, polishing or covering of coffees taken place or done at that time?

Mr. Fox: Objection.
Objection sustained. Exception taken.

Q. I have forgotten whether I have asked you at what time and how you first learned of the existence of the New York statute?

Mr. Fox: I object to that as irrelevant and not rebuttal.

Q. Of adulteration?

Objection sustained. Exception taken.

Q. And also as to whether in your communication to the exchange you relied upon the New York statute of adulterations?

Mr. Fox: I object.
Objection sustained. Exception taken.

Cross examination by Mr. Fox:

These various samples which have been shown to me and have been marked Plaintiff's Exhibits AA, BB, CC, DD and EE, are not in the same condition so far as the amount of coloring matter is concerned as they were when the coffee was tendered to me; entirely different. I mean that the coloring matter has disappeared to a large extent.

Q. If Mr. Kellogg had not been willing to take our admission would you still from your personal knowledge have identified those coffees as the very coffees you saw in Baltimore and that came here?

A. No.

Q. Didn't you discuss before recess the difficulty of proving it?

A. No, I could not have identified it.

Re-direct examination by Mr. KELLOGG:

There have been other things to take any color off that coffee other than the fact that I testified to it in my examination, natural drying up of coffee. In a hot, dry office the bean shrinks, and in the course of six years the powder or ochre will disappear and
88 pour off of the beans. The moment the sample is handled in any way the powder disappears. The moment you touch it, it will go on your hand, it will drop to the bottom of the pan. A black bean has a hard, flinty surface, a smooth surface, it will possibly disappear from that quicker than it would from a sour bean or a withered bean, or a bean with a rough surface. The black beans are the ones, being hard, generally of a hard character, it will lose the color more than rough beans.

Q. How do you learn that Mr. Lurman?

Mr. Fox: I object to that as irrelevant. It is not as if I had called him and they were cross-examining. He takes his answer on his re-direct, and then he desires to cross-examine him as to that. I object to that as irrelevant and not rebuttal.

Mr. KELLOGG: I have a right, it seems to me, to inquire of this gentleman how he has learned these facts, in order to ascertain the basis of his statements.

The COURT: You may ask from these identical samples.

A. From these identical samples? Not the small bag samples

but the five pound samples which I had in bags, of which this is a part.

Q. And in no other connection?

Mr. Fox: I object to it as irrelevant.

A. No. It is simply in connection with these samples that I have learned that this stuff flakes off from the black beans and drops to the bottom of the bag or pan or receptacle.

Q. Have you any of those scales or scalings off, whatever you may call them?

A. I didn't preserve them.

Q. Didn't you think that would have been a very good point to show the change that the samples have undergone if you had preserved them, Mr. Lurman?

Mr. Fox: We object. I submit that is not rebuttal.

The COURT: He may answer.

89 A. It would be a sample of ochre, or whatever this stuff was, it would not be on the beans.

Q. No, it would be off the beans, wouldn't it?

A. We had that from the chemist.

Q. You have not got any of these little pieces of ochre off of the beans?

A. No, I have not any of those.

Q. You never preserved any, did you?

A. No. If you give simply a puff it is an impalpable dust—not an impalpable dust, but it is dust, and it is powder, and the powder in handling it disappears from off the coffee.

Q. You noticed that dust at the time you handled the samples, did you not?

A. I noticed that I had to wash my hands.

Q. You noticed it in the bottom of the bag or pan, the collecting of this dust?

A. In the pan and on my hands, and my hands became yellow.

Q. And you knew that this question was coming up before a jury, did you not? Did you not know that you were being sued?

A. What date?

Q. Any time since the beginning of this suit?

A. I knew when I was sued, of course. I knew I was sued.

Q. You were sued shortly after this controversy, weren't you?

A. It is about November, I think, or October, some time.

By Mr. Fox:

Q. November 14th, 1894?

A. I knew then that sure.

By Mr. KELLOGG:

Q. You were sued three months after the time that this controversy first arose, weren't you?

A. Whatever the date was, it is a matter of record.

Q. That powder had not scaled off then, within three months, had it, or had it?

A. It had scaled off to a limited extent at that time, but very limited.

Q. It had scaled off still further after that time, and within six years that elapsed thereafter?

A. I think it had, yes sir; it did.

90 Q. And you knew that the question would arise, did you not?

A. I most certainly did.

Q. It would have been wise to have preserved *that substance* so as to show the jury?

A. Mr. Kellogg, I have done a great many unwise things in my life.

Q. This is one of them?

A. I have done a great many unwise things. I would have done quite differently in this case if I had done a great many different things.

Q. I think you are quite right as to that. I agree with you. You mean to imply this is one of the unwise things you did?

A. May or may not have been. I don't know.

COLUMBUS O'DONNEL LEE, called as a witness on behalf of plaintiffs, being duly sworn, testified as follows:

Direct examination by Mr. KELLOGG:

My business is a coffee jobber and importer. I live in Baltimore. I am here at the request of the defendants in this case, Messrs. Lurman & Co. I examined samples of this Catania coffee in 1894.

Q. I wish you would look at these bags that are marked Exhibits AA to EE inclusive, and tell me what they are?

A. I would not recognize them as samples. I should say they were a low grade coffee, slightly colored.

Q. Look at it very carefully please, and tell me whether you have any doubt that they are samples of the Catania shipment?

A. I have very grievous doubt for they don't look the same to me.

Q. You don't think they are samples of the Catania coffee?

A. They may be. I couldn't swear that was the same coffee.

Q. You are very uncertain as to whether they ever came on the Catania, are you?

A. I am not certain as to that.

91 Q. Now, Mr. Lee, did you examine the original samples?

A. I did, in 1894, I think.

Q. What did you find when you examined them?

A. I found coffee very nicely colored over with some kind of yellow powder.

Q. Which has been testified to be yellow ochre?

A. I believe so.

Q. No doubt about that being it?

A. I don't know; I am not a chemist.

Q. What did you see as to the quality of the coffee which was thus colored over when you examined it?

A. I saw coffee I say, nicely covered with yellow powder.

Q. Don't you understand the question Mr. Lee?

A. I saw a low—what I believe to be a low grade of coffee, very artistically covered. I should say the artist had covered up as much as it was possible to do.

Q. A very good job, was it then?

A. Yes, as far as I believe.

Q. Now, what is it makes a low grade of coffee, Mr. Lee? What makes low grade coffee?

A. Black beans, sticks, stones, damaged beans of all kinds; damaged beans of various kinds. I could see black beans with a little coloring on them. I don't think I could see white beans for the coloring matter. I am sure I couldn't see brown beans. I could see black beans with a yellow coloring on it.

Q. When did you make this examination?

A. I forget, whenever this controversy began. In Baltimore I was asked to look at the sample.

Q. About the time the controversy began?

A. About the time the controversy began. I don't remember the exact date.

Cross-examination by Mr. Fox:

Q. Mr. Lee, the coffees that you examined—I show you bags of coffee marked Exhibit BB, and ask you whether the
92 coffee that you examined in Baltimore had more or less coloring matter on it than the coffee in that bag, Exhibit BB?

A. I should think it had more.

Q. Have you any doubt about that whatever?

A. None whatever.

Q. Isn't it a fact that the coffee and samples that you saw in Baltimore were covered entirely with a yellow substance that did not belong to the coffee? Didn't you so testify on the former trial?

A. Yes, they were colored entirely. I saw black beans; you could see the yellow on them, but it was all over the coffee.

Q. Is it not a fact that you testified on the former trial Mr. Lee, to the fact that the coloring substance in fact covered over defects in the coffee?

Mr. KELLOGG: That is objected to as improper and irrelevant. Objection overruled. Exception taken.

A. Damaged beans are of different kinds. Black beans, sour beans, what we call sour beans in the trade, and brown, yellow beans, defective beans. They are all different shades. I could only describe as brown and white and yellow—I mean black, not yellow. Pale white, yellow and black. It is a fact that the presence of such damaged beans is one of the characteristics of coffee known as number nine grade. I washed some of the coffee that I saw. I simply

put it in a glass bottle with some water and shook it up. Shook it up that way. (Indicating.) The result was I got a lot of dirty yellow water. And then I examined the beans again after they had been submitted to this washing process. I examined them and brought them to New York with me. After I had submitted them to this process of washing I saw the variety of colors, which I had not seen before, as this powder had made them all as far as possible to be of a uniform color. This bag has got my name on it.

93 Put there by myself. The bag contains sample number nine coffee, New York Coffee Exchange. I went to Mr. Waltser, the manager of the exchange, and got it.

Q. Is it a fact that previous to the time that this controversy arose polished and colored coffees were regularly in demand in certain parts of the United States?

Mr. Fox: I object to that as not relevant and not rebuttal.

Objection sustained. Exception taken.

By Mr. Fox:

Q. After removing this color stuff, did you discover the rain damaged beans in the sample—you did, did you not, Mr. Lee?

A. I discovered what I believed to be rain damaged beans, yes.

Q. Can rain damage in coffees be discovered by the hand, Mr. Lee?

A. The hand, in connection with the eye. And the additional size of the rain damaged beans. Color does not affect the size of the bean. It is just as big whether it is colored or not. The coloring matter would be on there that wouldn't affect the size of the bean. I could see it was a swollen bean just as clearly as if the color was not on it. I could tell whether it was a swollen bean. I could tell by the spongy feeling in the hand that it was a rain damaged bean if it existed. I could tell as an expert.

Q. I wish you would look at the samples and show me some samples of rain damaged beans.

A. These samples are six years old I am told. If there was any rain damage it is as dry as a bone now.

Q. Rain damage dries off afterwards, doesn't it?

A. Yes, sir, like anything that you wet.

Q. Can you or can you not tell now?

A. I couldn't pick out rain damaged there now.

WILLIAM F. BRILL, called as a witness for plaintiffs, being duly sworn, testified as follows:

94 Direct examination by Mr. KELLOGG:

My business is warehousing and merchandise. In the employ of Brooklyn Wharf & Warehouse Co. With this company five years. Before that time with Martin & Fey. The full business was transferred to the Brooklyn Wharf & Warehouse Company. This bag contains a lot of samples drawn for the account of W. H. Crossman & Bros. ex Catania.

The samples thus drawn were in my custody for a long time. After that I had them sent to Brooklyn and kept in a safe place where I could identify them. That bag which is presented here ha a seal upon it. I put that seal there. On Friday or Saturday. O last week. Before that, as I say, they had been in my custody in New York, in the New York office, then afterwards sent to Brooklyn. They were under seal there. They were sealed samples for five years and over.

Sample of coffee marked Plaintiffs' Exhibit FF for identification.

Those coffees were drawn from the Catania. On account of W. H. Crossman & Bro., on their order.

Q. Look at the contents, please, of the entire bag—tell me what marks are upon these bags?
A. W. H. C. with a Z under, chop 251.
Q. Please look at this bag and tell me what that is?
A. W. H. C. Z under, chop 252.
Q. Look at the other bags please.
A. W. H. C. with a Z under, chop 255. That is indistinct. I think it is 255, it may be 35. W. H. C. with an L. under.

FREDERICK SCHILLING, JR., called as a witness for plaintiffs being duly sworn, testified as follows:

Direct examination by Mr. KELLOGG:

My business is coffee broker in the city of New York. Have been a coffee broker 18 years. I am a licensed grader of the
95 Corn exchange. And was in 1894. I examined certain samples of the coffees in question, on that examination. I found a coated coffee, powdered coffee. My recollection is there were five chops. Coated with a yellowish powder. The coffee had about the same amount of imperfections, damaged beans and black beans as a number nine; that is some of the chops, some of five or ten chops were better and some poorer. They were not of the same grade, as I remember. Black beans and imperfect beans, shriveled beans, sticks; I don't know whether any stones or not. I rather think there were. The coffee I examined contained on the average of all the chops the imperfections which are found in number nine grade; nine, and between eight and nine, I imagine. I graded some of them a few points better than nine and some poorer.

Q. What do you say Mr. Shilling, as to the effect which this coloring matter had produced on these coffees?
A. Do you mean as to value?
Q. No, no. As to these imperfections we have been speaking of?
A. As to whether it covered them or not?
Q. Yes.
A. No, it did not cover them.
Q. If there were sticks there, could you see the sticks?
A. I could.

Q. Without removing the color?
A. I could.
Q. Stones and dirt, of course?
A. Yes.
Q. Black beans?
A. Yes, sir.
Q. It has been testified, Mr. Shilling, that this color had been so put on as to make all the coffee absolutely uniform so that any difference of color could not be detected while the coating was on the coffee. What is the fact as to that, from your own knowledge?
A. It is not so. I was the arbitrator appointed.

Q. I would like to ask another question—I see no use of
96 going into that grading business—and that is, whether in grading the coffee you made an allowance for the presence of this coloring matter?

Mr. Fox: That is objected to. Objection sustained.

Q. I ask you to look at the samples which are in evidence of this Catania shipment. Look at all of them, please. Will you state please, in what condition they are as compared with the condition of the samples that you examined in 1894?
A. Well, as I remember those samples there is very little difference.
Q. I ask you to look at these three pans of coffee No. Z 251, 252 and 253, and tell me how the condition of those pans compares with the conditions of the samples of the Catania coffee that you examined in 1894?
A. Practically the same.

Cross examination by Mr. Fox:

I act as broker for almost all the houses here in New York; general broker. I have known Messrs. W. H. Crossman & Bro. for some time. Have sold them goods. Have had business dealings with them, more or less, for about eighteen years.
Q. And you have had some conference or consultation with either Mr. Crossman or his attorney, have you not?
A. I have.
Q. During several years back, have you not?
A. Before the first trial, yes.
Q. And since the first trial?
A. Yes, the second trial.
Q. And since the second trial?
A. Yes, sir.
Q. And to-day?
A. Yes.
Q. And on other occasions you have been at the office of the attorney for the plaintiffs?
A. Yes, sir.
Q. Mr. Kellogg?
A. Yes, sir.

Q. Several times?
A. Not several times.
Q. Not infrequently?
A. I don't know what you call infrequently.
Q. What do you call it?
A. I have been perhaps three times.
97 Q. And have met there other coffee experts?
A. Yes, sir.
Q. Who?
A. Mr. Small and Mr. Pickslay and Mr. Bayne.
Q. Anybody else?
A. Not that I can recall.
Q. Anybody else? Who else was present on those occasions, except Mr. Small, Mr. Pickslay? Mr. Bayne, Mr. Schilling and Mr. Kellogg? Who else was present, if anybody?
A. Mr. Crossman.
Q. George W. Crossman?
A. Yes.
Q. And I suppose you have gone over this matter more or less carefully, have you not?
A. How do you mean, more or less?
Q. What do you understand by more or less carefully?
A. Talked over the facts of the case. That is all that I remember.
Q. All together?
A. All together.
Q. And talked over the subject matter of your testimony, did you not?
A. I have read my testimony of the first trial.
Q. How long ago?
A. About a week ago.
Q. More or less carefully?
A. No, not that way at all.
Q. Just casually?
A. Just casually; it was not very long.
Q. Now, you did find a coloring substance on this coffee, didn't you?
A. Yes, sir.
Q. And it was yellow?
A. Yellowish.
Q. Looked like yellow powder, didn't it?
A. Yes, sir.
Q. It was a yellow powder wasn't it?
A. Seemed to be, yes.
Q. Didn't you see it was?
A. No, I didn't. I presume it was. It seemed so to me.
Q. It seemed to you to be a yellow powder?
A. It looked more like——
Q. A yellow powder than anything else?
A. Yes.

Q. Ochre, a chalky powder?
A. Yes.
98 Q. It looked like what is called yellow ochre?
A. Yes.
Q. Of course, you had not seen this coffee before it was coated or painted, had you?
A. No.
Q. Did you wash any of this coffee?
A. I did not.
Q. Did you take a rag or any other substance, and rub any of the coloring matter off?
A. I did not.
Q. So as to see what you could see after you had removed it?
A. No, sir.
Q. You did not do anything in the way of removing any of this yellowish substance for the purpose of seeing what appearance in fact the coffee would have after the removal of such substance?
A. I did not.
Q. Did both the smooth beans and the rough beans take the coloring alike?
A. No. The smooth beans are hard. They would not take the coloring.
Q. Not so well at the othors; they did not take the coloring so well as the others; is that it?
A. No.
Q. However as a matter of fact, did the super-imposition of this yellowish matter make the whole of the coffee of a general yellowish appearance; did it, or did it not?
A. It did, to a certain extent.
Q. Did it, or did it not?
A. Not entirely. If you gave a general glance, a casual glance it looked a yellowish appearance.
Q. At a casual glance?
A. Yes, sir; if you examined it carefully it did not.
Q. I show you three pans of coffee which Mr. Kellogg showed you. Have they been in your personal custody at all?
A. Those, no sir.
Q. Do you know how much they have been handled?
A. I do not.
Q. Do you know anything about them except the fact that it is colored coffee?
A. I do not.
Q. Now, isn't it a fact that the addition of this coloring to
99 the coffee made the coffee appear of a different color from the natural coffee?
A. Well, yes, I should say so.
Q. No doubt about that, have you?
A. No.

Re-direct examination by Mr. KELLOGG:

The coloring matter which I saw on these beans was not opaque so that I could not see through it and see what the beans were like.

ROBERT HUNTER, called as a witness for plaintiffs, being duly sworn, testified as follows:

Direct examination by Mr. KELLOGG:

I am a clerk in the custom house. I have produced the original invoice of the papers, of the coffee that arrived on the Catania on August 14th, 1894. This is an invoice of goods brought in the vessel Catania, August 14th, 1894. I took them from the files in the custom house.

Mr. KELLOGG: I offer them in evidence.

Papers admitted in evidence and marked Plaintiffs' Exhibit GG. (Printed on page 140 of appendix.)

JOSEPH D. PICKSLAY, called as a witness for plaintiffs, being duly sworn, testified as follows:

Direct examination by Mr. KELLOGG:

My business is coffee and sugar broker. Have been in that business 23 years. I am a member of Williams, Russell & Co. We have been plaintiffs' brokers since 1886. In 1894 I examined samples of this Catania shipment. I found that they were coated slightly with a yellowish substance, that they were a low grade coffee containing black beans, sticks, and I believe some stones and other imperfections. I saw those black beans and other imperfec-
100 tions through this coating. It is not true that the beans were so covered that those things could not be seen until the coating was removed.

Q. I wish you would look at the samples AA to EE inclusive, will you tell me how the conditions of those samples you have just looked at compares with the samples that you examined in 1894?

A. I can see very little difference. In my opinion the coating on the beans emphasized the defects.

Q. Will you look at the pans of coffee, W. H. C. Z. 251, 252 and 253; will you tell me whether those samples—what the condition of those samples is compared with that of the samples you examined in 1894 of this coffee?

A. I see very little difference.

Mr. KELLOGG: I offer those in evidence.

Samples admitted in evidence and marked Plaintiffs' Exhibits HH, II and KK.

Cross-examination by Mr. Fox:

Q. Mr. Crossman referred to a Mr. Pickslay as being his confidential agent; are you the person?
A. I presume I am the one he refers to, yes.
Q. Mr. Schilling remembers various different occasions on which he met at the office of Mr. Kellogg several of the experts who are testifying in this case. Did you hear Mr. Schilling testify to that?
A. I did sir.
Q. Do you corroborate his testimony in that regard?
A. I do sir.
Q. You yourself were there on several of these occasions?
A. Yes sir.
Q. And went over the matter generally, did you not?
A. A matter of statement of facts.
Q. Pretty carefully?
A. Yes, sir.
Q. Now, you of course do not claim that you saw any of these beans in their natural condition before this coloring matter was put on them, do you?
A. No, sir.
101 Q. Did you subject any of these beans to washing so that you might be able to see the beans after the coloring matter was removed?
A. Have I since?
Q. I mean, did you back in 1894 when the coloring matter was fresh?
A. I did not, sir.
Q. Did anybody ask you to do that?
A. No, sir.
Q. Did you take a cloth and rub off even a portion of this—did you take a cloth or anything and try to remove, or remove any portion of this thick yellow substance?
A. I did not, sir.
Q. Were you asked by anybody representing the plaintiffs to submit this coffee to any other than ocular examination?
A. No, sir.
Q. By ocular examination, you understand me to mean simply the examination that could be made by looking at it, do you not?
A. Yes, sir.
Q. It is a fact, isn't it, that you don't know how thick this coloring matter was, do you?
A. I don't know exactly.
Q. You also testified on the former trial, did you not?
A. Yes.
Q. In this language: "I am unable to say how thick this coloring matter was." Do you remember testifying in that language?
A. Yes, sir, I believe I remember it.
Q. You have read your testimony over?
A. Yes, sir.

Q. So that you have no difficulty in remembering what I read to you?

A. I may possibly make some little slip, Mr. Fox.

Q. Do you remember that you were asked on the former trial this question: "Won't you please tell the jury how much of the Catania coffee you saw was colored; you understand my point?" And you inquired "What proportion of each sample?" Question "Yes," and you said then, "I should think it was all." The question
102 was then put to you: "Q. All of it?" And you answered "Yes." Is that correct?

A. Yes, sir, I believe so.

Q. Were you also asked this question, and did you give this answer: "Q. Then the work was done thoroughly, the whole of each sample and the whole of each bean was covered?" And you answered "Yes?"

A. I believe I did, yes.

Q. That is the fact isn't it?

A. To the best of my knowledge, it is.

Q. Your recollection then, in January, 1898, was of course, was it not, quite as accurate as it can be now?

A. Yes, sir.

Q. And you remember stating that this artificial coloring was uniform over the whole of the bean?

A. Yes, sir.

Q. And every bean throughout the whole of the samples?

A. Yes, sir.

Re-direct examination by Mr. KELLOGG:

Q. Mr. Fox used the words "thick yellow substance" in referring to this substance. A question I wish to ask you is whether you were then testifying to substances such as those now here, substantially the same, upon the samples that have been submitted to you?

A. Yes, sir.

Q. Mr. Fox has also asked you whether you washed any of these beans, or removed any of the substance from them, and you have said you did not. Was it necessary to do so in order to enable you to tell what quality the coffee possessed?

A. It was not necessary.

Mr. KELLOGG: I wish to offer the correspondence between the parties, each letter and telegram separately, as set forth on pages 59 to 70 inclusive, of the first record upon appeal. I understand
103 there is no objection made on the ground that they are not properly proven?

Mr. Fox: Oh no, of course.

I offer the letter from the plaintiffs to the defendants of August 13th, 1894, page 87 of the second trial.

(Papers admitted in evidence and marked Plaintiffs' Exhibits GG and HH.) (Printed on page 141 of appendix.)

Mr. KELLOGG: I also offer the telegram from the defendants and others to the plaintiffs, dated August 15, 1894.

Telegram previously marked Plaintiffs' Exhibit X for identification admitted in evidence. (Printed on page 141 of appendix.)

Mr. KELLOGG: Also the letter of defendants to plaintiffs, dated August 15th, 1894.

Mr. FOX: Without waiving the right to object hereafter to parts of the testimony, I suggest I don't think that is rebuttal. Let it go.

Letter admitted in evidence and marked Plaintiffs' Exhibit JJ. (Printed on page 142 of appendix.)

Mr. KELLOGG: A second letter of August 15th, 1894, from defendants to plaintiffs, from page 89 of the first record beginning: "We confirm our telegram of date."

Letter admitted in evidence and marked Plaintiffs' Exhibit KK. (Printed on page 143 of appendix.)

Mr. KELLOGG: I also offer telegram dated August 15th, 1894, signed "Crossman" addressed to the defendants, beginning: "In reply to your telegram."

Exhibit previously marked Y. for identification admitted in evidence. (Printed on page 143 of appendix.)

Mr. KELLOGG: I will offer the letter dated August 16th, except the postscript, from the plaintiffs to defendants.

Letter admitted in evidence and marked Plaintiffs' Exhibit LL. (Printed on page 144 of appendix.)

Mr. KELLOGG: I now offer letter of August 29th, Crossman to Lurman.

104 Letter admitted in evidence and marked Plaintiffs' Exhibit MM. (Printed on page 145 of appendix.)

Mr. KELLOGG: I also offer a letter of September 20th, Crossman to Lurman, beginning, "In answer to your letter of the 19th."

Letter admitted in evidence and marked Plaintiffs' Exhibit NN. (Printed on page 145 of appendix.)

CYRUS K. SMALL, called as a witness for plaintiffs, being duly sworn, testified as follows:

Direct examination by Mr. KELLOGG:

I am a coffee broker. I am a licensed grader of the Coffee exchange. Have been continuously a licensed grader of the Coffee exchange since its inception, with the exception of about thirty days. During that time I was suspended for thirty days, on account of a temporary or a little irregularity, supposed irregularity. During that thirty days I did not do any duty as a licensed grader of the exchange. After that time I resumed my duties as a coffee grader. I am the gentleman named in the contract between the plaintiffs and the defendants in this case, as a grader. I examined the samples of the Catania coffee in question.

Q. I wish you would look at Exhibits AA to EE inclusive, that I have handed you. Will you state in what condition those samples are as compared with the samples that you then examined?

A. I would say that they are the same samples, in the same condition.

Q. Will you look at the Exhibits HH, JJ and KK, which I have handed you, and tell me, if you please, what the conditions of those Exhibits is as compared with the samples of Catania coffee that you examined in 1894?

A. I should say they were in the same condition.

Mr. KELLOGG: I wish now to offer in evidence those bags
105 of coffee marked "Ex Catania, W. H. C. Z. 251, to 256," inclusive.

Samples admitted in evidence and marked Plaintiffs' Exhibits OO to TT.

Mr. FOX: It is conceded that the six bags of coffee now produced came out of the bags produced yesterday by the plaintiffs' witness, Brill, and that no further proof shall be required as to their indentity, I being willing to let them go in without any proof.

Q. Mr. Small, suppose you take any one of these bags; please pour coffee from that bag into the pan which you hold, being careful that none of the dust escapes, just as carefully as you can, please?

The witness poured out the coffee from the sample marked PP.

Q. Have you been as careful as possible about not allowing any of the dust to get away in pouring out this coffee, Mr. Small?

A. I have, sir.

Mr. KELLOGG: I wish the jury to examine this sample, being one of the samples that was under seal for six years.

The jury does so.

When I examined those coffees, I saw coffee colored with some substance, black beans, various colored beans, sticks, and what things go to make up a lower grade of coffee. Afterwards I removed some of this coloring matter from a portion of the coffee which I examined. I found the coffee of a better appearance and improved in general condition. The imperfections which I had seen when the coloring matter was on the coffee I saw after it was removed.

Q. The word "opaque" has been used in this trial as applying to the nature of the coloring that was upon this coffee. Will you state whether it is true that this coffee was covered with a substance which was so opaque that you could not see the imperfections through it?

A. You could see through it, sir, plainly.

106 Q. Now, Mr. Small, perhaps the jury would like to know the circumstances of the irregularity that you mentioned in the beginning of the testimony, which resulted in your temporary suspension from the exchange as a grader?

A. It was a lot of coffee which I had sold for San Francisco account, coffees to be graded or arbitrated upon the Coffee exchange. When the coffees arrived I found them to be inferior to the grade upon which they were sold. I so stated to the buyer that as the coffees were sold to be arbitrated on the exchange I had to force an

arbitration there, and the only way that I could do it was by putting on a grade to make the coffee equivalent to the coffee sold, and with the understanding of the buyer, which I went to him and stated, that that was the only way in which I could bring the thing to a focus and get an arbitration, and I asked his permission to do so. He agreed to do so, but at the last moment when the coffee went to arbitration he made a complaint against me for so doing. It was a technical irregularity; something that is done almost every day I believe in the trade.

Q. And that irregularity resulted, after the complaint was made, in your suspension for thirty days from the exchange?

A. It did.

Cross examination by Mr. Fox:

Q. What is all this about, Mr. Small? Do you wish this jury to understand that coffee brokers are doing every day the kind of thing you did, and for doing which the authorities suspended you? You have said that. Do you mean that?

A. Yes, sir. As I said, with the permission and understanding of the buyer.

Q. I am rather surprised to hear it. It probably is true if you say so. Whatever it was that you did, it seemed to the authorities to be something that was misconduct on your part; is that so.

A. Yes, sir.

Q. And by reason of that misconduct they suspended you for thirty days; is that so?

A. They did.

107 Q. And whatever it was that you did that amounted to misconduct is something that coffee brokers are doing every day substantially?

A. Yes, sir.

Q. I suppose that has been so right along, hasn't it?

A. Yes, sir.

Q. How long have you known Mr. Crossman?

A. For 18 years, I should say.

Q. When was it that you were suspended for these thirty days? How long ago?

A. It was in 1895 or 1896, I think.

Q. That was just the very year after you had to do with these coffees, wasn't it?

A. No, sir; I don't think very near.

Q. I say about the year, the very next year?

A. If that is near, yes, sir.

Q. You have not been doing this kind of thing since you got suspended?

A. I couldn't answer that question.

Q. Then perhaps I ought not to press it. I appreciate the difficulty of that. By the way, are you one of the coffee experts who attended certain meetings or consultations at the office of Mr. Kellogg?

A. Yes, sir.

Q. About how many times have you been there on that errand?
A. Two or three times.
Q. You have testified before, haven't you, in this case?
A. Yes, sir.
Q. Did you ever tell the jury anything on the other trial about your having been suspended?
A. No, sir.
Q. Now there was coloring matter on about 200 out of the 500 bags, wasn't there?
A. I should think there was.
Q. Won't you go a little further and also say that you know there was?
A. I know there was on the samples which I saw from the coffee.
Q. And you understood that those samples were fair samples out of about 203 or more bags, didn't you?
A. I did.
108 Q. And what was the color, was it yellow or brown, or red?
A. Yellowish.
Q. I show you Exhibit B 1; please put out some of that coffee, do anything with it, take it in your hand, or anywhere, and tell me whether you see in that coffee any beans that according to your definition are damaged beans?

Mr. KELLOGG: I repeat my friend's repeated suggestion by asking what the materiality of this is. I object to it as immaterial.

A. It is a technical question, one which I would have to qualify.
Q. I don't want your technical questions; do you find beans in there of different shades of color?
A. Yes, sir.
Q. Do you find pale beans there?
A. Yes, sir.
Q. Do you find shriveled beans there?
A. Yes, sir.
Q. Withered beans?
A. Yes, sir.
Q. And in other words, all shades of color that are usually found in low grade coffees?
A. Yes, sir.
Q. Now, I show you Exhibit C. and ask you whether those beans do not present so far as color is concerned a substantial uniform appearance?

Mr. KELLOGG: That I object to because there my friend is getting back to exactly the same point as to other coffee standards.
Mr. FOX: There is no question about standards here at all.
Mr. KELLOGG: That was put in evidence as evidence of a certain higher standard.
Mr. FOX: It was not. On your own suggestion I said I offered it in evidence not as coffee of any particular grade. On that statement your honor let it in as coffee described by Mr. Crossman himself.

Mr. KELLOGG: No matter in what capacity the coffee is referred to, it is not the coffee to which your honor has confined our attention.

109 The COURT: I think so too; I think it should all be kept out.

Mr. FOX: It is in as evidence.

Mr. KELLOGG: If it is in as evidence, I move now, under your honor's other rulings, to strike it out entirely and withdraw it from the attention of all parties concerned.

Mr. FOX: It is evidence which will be of extreme importance for the purpose of showing what the effect is of——

The COURT: I don't intend to strike it out.

Mr. FOX: Then I am quite content.

Mr. KELLOGG: I take an exception.

Q. This substance, whatever it was, that covered the beans over, covered each bean, did it not, that you saw?

A. More or less so.

Q. Is it not a fact that upon the first trial you were asked the following question, and gave the following answer: "How much of the bean was covered? A. I should say all of it." Did you give that answer in 1898?

A. I probably did, yes, sir.

Q. Don't you think it is quite possible in January, 1898, your memory upon that subject was just a trifle fresher than it is in April, 1900?

A. No, sir.

Q. Which answer do you desire the jury to take as being correct, the one given here to-day, or the answer that I have just read to you that you gave in January, 1898?

A. I think the coffee was more or less colored all over.

Q. Do you remember that you were then asked: "It was done with some completeness of process?" And you answered "I should think so."

A. Yes.

Q. By the way, have you read your testimony since you gave it?

A. Yes.

Q. How long ago?

A. Some weeks ago.

Q. With some degree of care?

A. I read it over once.

110 Q. Did you find anything in it to correct?

A. No, sir.

Q. You found that what you said then was true, did you?

A. Yes.

Q. Then it is true, is it not, that all of each bean was covered with this yellow substance?

A. As near as I could see.

Q. All of the beans that you saw were covered, were they?

A. I should say so, and yet it is very hard to tell.

—. Didn't you testify on the former trial as a matter of fact without any qualification whatever, that all of the beans were so covered?

A. I think I did.

Q. Wasn't it true?

A. I think it is.

Q. That was done with some completeness, was it not?

A. I presume it was.

Q. Don't you know it was from what you say?

A. I am not in that business; I can't tell how complete it was.

Q. I didn't ask you with what skill it was done; I asked you with what completeness the beans were covered with this coloring matter. Can't you answer that without being in this unpleasant business?

A. I don't know that I can answer that with completeness; I think it might have been done better.

Q. You remember that you were asked upon the other trial as follows: "It was done with some completeness?" and that you answered: "Oh yes."?

A. Yes, I think so.

Q. That is true, is it not?

A. Yes, I think that is true, with some completeness.

Q. You are willing to say that you think that is true?

A. Yes, sir, I still think so.

Q. Is it not true that you were then asked this question: "It must have been done with some uniform process of some sort?" and that you answered: "I think so?"

A. Yes, sir.

111 Q. You were then asked, were you not, "It must have been put through a coloring mill?" and you answered, did you not, "I should say so?"

A. Yes.

Q. How did you wash this coffee that you washed?

A. I put it in a cloth and wet it with water and rubbed it.

Q. Got the cloth?

A. No, sir, I never kept it.

Q. It was hardly desirable to keep, I suppose, was it?

A. I never thought of it.

Mr. KELLOGG: I object to that sort of a question.

Q. What did you do with it? Did you know at that time Mr. Small, that there was any controversy then pending or not unlikely to arise between Messrs. Crossman and the defendants?

A. I knew there had been a question, nothing more.

Q. What did you know about it—didn't you know the defendants had refused to receive it?

A. I knew that.

Q. When was it that you washed this coffee; how long after you knew that the defendants had refused to receive it?

A. I don't recall when, but I imagine immediately after.

Q. Did you in fact scrape off any of the yellow substance?

A. No, sir.

Q. Did you shake it to see if you could shake any off?
A. No, sir.
Q. Did you keep anything that you got that you removed from any of these beans?
A. No, sir.
Q. Don't you think it would have been very wise if you had?
A. Under the circumstances, yes, sir, if I had known.

Mr. Fox: I wish you had.
Mr. Kellogg: So do I.

Q. By the way, have you ever tried the experiment except on these beans, of trying to see through yellow ochre, or was this your first experiment in that regard?
A. The first time I ever washed any coffee, I suppose.
112 Q. Were you present before the adjudication committee?
A. Yes, sir.
Q. Was Mr. Crossman there?
A. No, I can't swear that I was present before the adjudication committee.
Q. Don't you know that you were there, and don't you know that upon that occasion Mr. Crossman admitted before the adjudication committee that the coffee was colored, don't you know that?
A. I have no recollection of it.
Q. You have no recollection?
A. No, sir.
Q. How long have you known Crossman, did you say?
A. I imagine about eighteen years.
Q. Done a good deal of business for him?
A. Yes, with him.
Q. Have you?
A. Yes, sir.

Re-direct examination by Mr. Kellogg:

Q. Do you mean that you were associated in business with Mr. Crossman?
A. Never.
Q. Have you acted as broker for him principally?
A. Only in selling to him.
Q. In selling to him?
A. Yes, sir.
Q. And that is the way you have done business with him?
A. Yes, sir.

Re-cross examination by Mr. Fox:

Q. Do you mean to say that you had a hearing before this governing body of the Coffee exchange that suspended you?
A. Yes, sir.
Q. And you laid these facts before them?
A. As nearly as I could.

Q. Substantially as you have before this jury?
A. I presume so.
Q. You intended to do so, didn't you?
A. Yes.
Q. Had just as good an opportunity as you had here?
A. I imagine so, yes, sir.
113 Q. And notwithstanding that they found you guilty of misconduct didn't they?
A. Technically, yes sir.
Q. They found you guilty of misconduct and you have seen the finding, haven't you?
A. No, sir; I have never seen the finding; I have never looked at the records.
Q. Didn't you tell me when I first examined you that they did find you guilty of misconduct?
A. Yes, sir.

Re-direct examination by Mr. KELLOGG:

Q. You have said, I think, in answer to Mr. Fox that this question of putting a grade higher than the coffee bears in order to force an arbitration was something done by brokers every day?
A. Yes, sir.
Q. Did you refer to that being done with the consent of both parties so as to bring about an arbitration that will settle the whole matter?
A. Yes, sir.

Re-cross examination by Mr. FOX:

Q. You have said to the jury that when you washed this yellow stuff off the coffee, you saw that the coffee was much better coffee than you thought it was before you washed it off. Will you look at these two exhibits one Exhibit 4 and the other Exhibit 10 and tell me whether in your opinion either one of those coffees looks any better than the other?

Mr. KELLOGG: I object to that question as putting words in his mouth that he did not use.
The COURT: I will allow it.
Mr. KELLOGG: I except.

A. I don't think I so stated; I think I stated I found it better, not better than I thought it was.
Q. You said much better, I think?
A. Yes, sir, but not much better than I thought it was.
Q. Look at those two samples and tell me whether in your opinion either one of those looks any better than the other to you?
A. I cannot tell much about coffee in glass jars.
Q. Take them out and put them in the pans. You have
114 got Exhibit 10 in your left hand, and Exhibit 4 is in your right hand. Now tell us whether you think that either one of these coffees looks any better than the other?

Mr. KELLOGG: That I object to as wholly irrelevant to the present inquiry, as they have nothing to do with our coffees in suit here.

The COURT: He may answer.

Exception taken by counsel for the plaintiff.

A. Yes, sir, I do.
Q. Which is it?
A. I think the one in my right hand looks better.
Q. The one in your right hand?
A. Yes, sir.
Mr. FOX: And that is Exhibit 4.

Mr. KELLOGG: I offer in evidence from the stenographer's minutes of the first trial the entire testimony of Mr. Benjamin D. Williams.

Mr. FOX: I object to it as irrelevant and not rebuttal.

Mr. KELLOGG: The testimony being on pages 84 to 110 of the first record, first stenographer's minutes.

Testimony indicated marked Plaintiff's Exhibit XX for identification, printed on page 149 of appendix.

Mr. FOX: No such practice as I know of, offering the whole testimony of a witness without regard to whether it is relevant or irrelevant.

Mr. KELLOGG: He happens to be a defendant in the case.

Mr. FOX: A defendant may say a great many things that are irrelevant.

Mr. KELLOGG: Do you make any objection as to the stenographer's minutes, Mr. Fox?

Mr. FOX: Oh, no.

Mr. KELLOGG: Then I particularly offer the testimony on pages 88 to 90 inclusive.

Testimony indicated marked Plaintiff's Exhibit Y for identification, printed on page 151 of appendix.

Mr. FOX: Your honor by looking at the testimony will see, and we object to it on that ground, that it relates to matters which are irrelevant in this action and are not rebuttal and relates to matters as to which your honor has already ruled.

115 Objection sustained as to each offer of testimony.

Exception taken separately by counsel for plaintiffs both to the exclusion of the portion separately offered and to the exclusion of Mr. Williams' entire testimony.

Testimony indicated marked Plaintiffs' Exhibit YY for identification, printed on page 154 of appendix.

Mr. KELLOGG: I also separately offer in evidence from the same record the testimony of the same witness, beginning with the words, "Have you had much" on page 92, and extending through pages 92 and 93.

Mr. FOX: You don't claim, Mr. Kellogg, this has reference to any different question from that which has been presented to the court?

Mr. KELLOGG: I offer the testimony as bearing upon the issues in the case.

Mr. FOX: I think it is merely some more of the same thing.

The COURT: It seems so to me.

Mr. KELLOGG: I respectfully except.

If your honor will consider the importance of testimony out of the mouth of one of the defendants; this has bearing upon the entire issue; it seems to me a very material point.

The COURT: I think not.

Exception taken by counsel for the plaintiffs.

Mr. KELLOGG: I also offer in evidence the entire testimony of the defendant, Lurman, from the stenographer's minutes in the first record, being that on pages 117 to 158 inclusive.

Testimony indicated marked Plaintiffs' Exhibit Z for identification, printed on page 167 of appendix.

Mr. FOX: I object to the court receiving an offer in that general form of forty-one pages of testimony. The court cannot rule upon forty-one pages of testimony.

Mr. KELLOGG: If your honor does not think it is admissible as an entirety, I shall offer certain parts of it. I offer it first as an entirety. Your honor does not think it proper. It is of similar purport as the other testimony I have offered.

116 Mr. FOX: With that statement I am content.

Objection sustained. Exception taken by counsel for the plaintiffs.

Mr. KELLOGG: And I offer separately pages 136, 137 and 138 from the same record of the testimony of Mr. Lurman.

Pages 136, 137 and 138 admitted in evidence and marked Plaintiffs' Exhibit UU, printed on page 146 of appendix.

Mr. KELLOGG: I also offer in evidence the testimony of the same witness beginning on page 145 and going to the words "By the court:" on page 146.

Mr. FOX: Am I quite correct that what you want to offer begins at the question: "What was it in particular that made you reject this shipment?" and ends with the answer to the question on page 146, "Although you bought it to sell in the market, that is your best answer to that question?"

Mr. KELLOGG: Yes.

The testimony indicated admitted in evidence and marked Plaintiffs' Exhibit VV, printed on page 148 of appendix.

Mr. KELLOGG: I offer in evidence part of Mr. Lurman's testimony beginning at the bottom of page 152 and extending——

Mr. FOX: Why didn't you ask them when you had Mr. Lurman on the stand?

Mr. KELLOGG: I asked them all and they were ruled out. I now offer them as admissions made by him on a preceding trial, and they have been admitted without objection.

Mr. FOX: I object to that as irrelevant. My friend says you have ruled it out, and I think you have. I object to it as irrelevant and not rebuttal.

The COURT: Objection sustained and exception.

Testimony indicated marked Plaintiffs' Exhibit WW for identification, printed on page 149 of appendix.

Mr. KELLOGG: I now offer in evidence the testimony of Mr. Bayne at the former trial, page 152.

Mr. KELLOGG: I read from page 208 of the stenographer's
117 minutes, to the bottom of page 209, to the third line from the bottom, of the stenographer's minutes:

"WILLIAM BAYNE testified:

Direct examination by Mr. KELLOGG:

Q. What is your business? A. Importer and jobber in coffee.

Q. How long have you been in that business? A. About twenty years.

Q. Were you engaged in it in the city of New York in 1894? A. I was.

Q. Are you a licensed grader? A. No, sir.

Q. Did you in 1894 see any of the samples of the Crossman-Lurman coffee in controversy? A. Yes.

Q. Where were these samples seen by you? A. I saw them in Mackey & Small's office and I saw them in Williams, Russell & Co.'s office.

Q. Did you make any examination of the samples? A. Yes sir.

Q. Did you find any coloring matter upon them? A. Yes.

Q. What color? A. Yellowish color.

Q. Did you find any of the samples which you examined to be rain damaged? A. No sir.

Q. What effect did the coloring matter which you saw produce upon the general appearance of the coffee examined?" "A. Injured it.

Q. What effect did it produce upon the apparent value of coffee examined?" "A. Injured it.

Q. What business relationship exists between your firm and you or your partner and Crossman & Brother? A. None whatever."

Plaintiffs rest.

Defendants rest.

Testimony closed.

118 Mr. KELLOGG: I make a motion for a direction of a verdict for the plaintiffs upon the following grounds:

First. That under the stipulation which shows that the standards of the exchange were unadulterated coffees, and which shows that these goods were arbitrated and found to be under the contract a good delivery, therefore, the arbitration is conclusive upon the parties to the case as to the question of the statutory adulteration, as well as upon all other points.

Second. That there is not sufficient evidence to go to the jury as bearing upon any question of adulteration under the statute. And,

Third. That the statute itself, so far as it is attempted now to be

applied to goods from a foreign country, and which come within the operation of the United States laws, and which were in the original packages, so far as this contract was concerned, it appears by the stipulation and the evidence is unconstitutional and therefore inoperative.

Motion to direct a verdict denied.

Exception taken by counsel for the plaintiffs upon each ground of the motion.

Charge to Jury.

BEACH, *J.*:

GENTLEMEN OF THE JURY: This action results, in part at least, from the following conceded facts; and in presenting it for your consideration, the court hopes to be able to place the issues so clearly and plainly before your mental vision, that you will really wonder that we have been so long in the trial, because since Monday morning we have been striving to acquire information which will enable us, the court and yourselves to do justice between these parties.

119 The real issue of fact which you have been empaneled to decide is so simple that it could be stated to you, if lawyers were not employed, in ten minutes.

On the 7th day of July, 1894, the plaintiffs in this action Messrs. W. H. Crossman & Brother, who are dealers in coffee in this city, sold to Messrs. Theodor G. Lurman & Company, in like business at Baltimore, Maryland, five hundred bags of coffee to arrive by the steamship Catania, a certain grade, a low grade, No. 8 or 9. That coffee duly arrived in port, and the defendants, Lurman & Company, were notified of its arrival in due course, and according to the established customs of trade. A portion of the coffee Messrs. Lurman & Co. declined to receive. After that declination that portion was sold for and on account of whom it might concern; and on its sale it produced a price which was some $1270 less than the contract price, and this action was brought for the purpose of recovering $1300.80, which with interest now amounts to $1716.80.

The defendants' position is that they were justified in refusing to receive this portion of the coffee, and therefore are not liable to pay the amount claimed in this action, because the coffee infringed the terms of an act of the legislature of the State of New York. And I beg to draw your attention to that act, because it is necessary for a just disposition of this issue that you should understand its scope, its limit and its bearing. That which is pertinent to this controversy rests in four or five printed lines. It is provided by section 41 of the public health law, chapter 661, Laws of 1893, as follows: "No person shall within the State sell or offer for sale any adulterated food or product. An article shall be deemed to be adulterated within the meaning of this act in the case of food"—that applies to coffee—"if it be colored or coated or polished or powdered,

120 whereby damage is concealed, or it is made to appear better than it really is, or of greater value."

Again the position of the defendants is that this coffee in question was colored or coated or powdered, whereby damage was concealed, or it was made to appear better than it really was, or of greater value. Is that established by the evidence or is it not? That is the question for you to answer. In considering the evidence, and upon that single point, you are to remember that the defendants, Messrs. Lurman & Co., hold what is called the affirmative of the issue and the burden of the proof, which, in legal signification means that they are to convince your judgments by the evidence produced and by a preponderance of proof that their contention is true, to wit: that this coffee when tendered, and the portion received by them, was in condition forbidden by the terms of that statute. If it was, its sale by Messrs. Crossman & Brother was an infringement of the law of the State, and they are not entitled to recover in this action, but the defendants would be entitled to your verdict.

I beg you, gentlemen, to dismiss from your minds anything that may be said, or may have been done upon this trial, except that which bears upon this issue. It is a very simple one? Was this merchandise so colored, etc., as to conceal damage, or make it appear better than it really was, or of greater value?

I shall make a very brief allusion to the evidence produced by each side, and it necessarily will be but for the purpose of drawing your minds to what seems to bear directly upon the sides of this contention, either the one or the other.

And you are to be guided in your consideration of the proofs, I beg to say, not from what the court may state them to have been—the court may be in error—but as your memory of the testimony of the witnesses shows the evidence.

121 Upon the part of the defendants, who have the affirmative, Mr. Jouet was called, who is a chemist at Columbia university, residing in this city. He says, as you all doubtless remember, that he examined the coffee chemically; upon or on the coffee he found a foreign substance, some form of iron, he says, opaque. He was not able to say from his examination that some of the beans were colored completely. And you will bear in mind, because it has been oft repeated here by counsel, that there is no question but that there was this coloring matter upon those coffee beans, none at all; that is conceded, it is plain to the eye. Mr. Crossman, or Messrs. Crossman & Brother, do not deny that. Of course it was not put on by them, it was on this coffee when they received it from Brazil. Mr. Jouet testifies on cross-examination that the opaqueness, which is the density with regard to the penetration of light, of oxide of iron depends upon its quantity; that is, a thin covering of the powder might be transparent, an application of it in quantity sufficient might render it opaque; in other words, so it could not be seen through. Upon cross-examination Mr. Jouet testified that he could not say whether the defects in this coffee were concealed or not, and that he could not say that there was any coloring matter on the beans. What he meant by that I do not exactly understand, except apart from the powder; perhaps.

Mr. Tillman testifies that he saw the samples, and that he washed the samples, and you will remember having had exhibited to you a portion of the coffee, I think, which Mr. Tillman washed, and the rag with which he rubbed it, where was plainly visible upon the rag the yellow color. And he did this in the latter part of the year 1894 when these transactions took place. Upon his cross-examination he testified that the beans were colored with this yellow substance, and that the color of the water after the emersion therein of the coffee was of a dark reddish mud color.

122 Then there was a witness, Mr. Lehman, who is a chemist from Baltimore, connected with the health department, and with the port of Baltimore. He testifies that upon an ocular examination of some of this coffee it appeared to be colored with a yellow foreign substance, opaque; that he removed some of it with an instrument called a spatula, and he found basic ferric salt containing elements yellow and opaque. Upon his cross-examination Mr. Lehman testified that he found about one-half gramme of this powder upon 100 grammes of the coffee, and he also said that the opaqueness of this powder depends on the quantity; and in addition to that he says that the powder on the beans was yellow and opaque.

That is the evidence upon behalf of the defendants, gentlemen, to support their contention that damage was concealed, etc., by this covering, against the provisions of the statute of this State.

Upon that issue the plaintiffs produce Mr. Lee, who is a dealer in coffee, from Baltimore. He testifies that this coffee was covered over with a yellow powder; he also says what it is well for you to bear in mind—because the fact is conceded by both parties—that this was a low grade of coffee, and that a low grade coffee contains damaged beans and sticks and stones and other articles of that character, which I am not familiar enough with the business to specify, but which makes it a low grade coffee. Mr. Lee says that low grade coffee contains black beans and damaged beans. On his cross-examination he says that he washed some and that the water was dirty and yellow. He says moreover, that he saw a variety of colors after washing not seen before.

Mr. Schilling is produced on behalf of the plaintiffs. He says he has been a coffee broker and trader for eighteen years; that this coffee was coated yellow, and carried with it the average imperfec-

123 tions of grade No. 9, or a grade between No. 8 and No. 9. Mr. Schilling testifies that on his examination he found that the coloring concealed no defects, but that the coloring produced by the use of this powder was not uniform. With reference to the samples he says there is no difference between the samples of this coffee produced here and those he examined. He says upon cross-examination, that he found what seemed to be a yellow powder, yellow ochre, but that he did not remove any. He testifies that the yellow covering by this powder was not thick and not opaque.

Mr. Pickslay testified for the plaintiffs. It seems from his evidence that he examined samples of this coffee, and he says he found it coated with a slightly yellowish substance; that it was a low grade

coffee containing damaged beans, etc.; and he testifies positively that that coloring did not conceal any defect in the coffee. He says, in his opinion, the coloring emphasized whatever defects there were in the coffee, and thinks there is very little difference between the coffee he examined and the samples of this same coffee produced here after a lapse of six years. Mr. Pickslay did not wash the coffee and used no cloth. He says that it is not necessary to wash coffee to discover its quality.

Mr. Small was a witness for the plaintiffs. He testifies in substance that he is a grader of coffee in this market, and that he saw upon examination of this coffee in question that the beans were colored, and that there were black beans and sticks and stones and other defects, so to speak, which go to make up No. 9 grade coffee. He says also that after the removal of this coloring matter the coffee improved; to be sure it had the same imperfections of No. 9 or of low grade coffee, but it improved in appearance. And that he could see the imperfections plainly when the coloring matter was on the coffee.

124 So much for the evidence on behalf of each of these parties, gentlemen, in support of their contention; and I have referred to it for the purpose of bringing to your minds clearly the simple point in issue, so that you may decide it without reference to any question of arbitration, or of grading, or of contracts, except so far as the contract in this case is concerned, or of any of these various proceedings and actions on the part of the plaintiffs since this, somewhat at least, unfortunate disagreement happened.

I am requested by the plaintiffs to charge you "that the only question which the jury have to consider is whether the coffees were adulterated goods within the meaning of the public health law of New York.

"That the arbitration which has taken place is conclusive upon the point that the coffees tendered were a good delivery under the contract unless the defendants are able to show in this case that they were adulterated goods." That is, that they infringed the provisions of this statute.

"That this statute is in derogation of the common law right of every one who owns property and is not to be extended beyond what can be fairly inferred from its terms." I think the terms of the statute are easily understood, gentlemen of the jury; they seem to have no peculiar significance. Perhaps the court should say to you that it is not the mere coloring of coffee which infringes the statute—and that you must remember—but it is the coloring of the coffee which produces the effects, as facts, specified in the statute; that is, concealing damages, enhancing value, etc.

"That the word 'adulteration' as used in this statute has simply the meaning which the statute gives it and that this meaning is not to be confused with any ordinary or common meaning of the word."

"That the mere fact that an artificial coloring matter was placed upon the coffees does not constitute adulteration under the statute."

125 "That the jury are not to consider any intent or purpose with which the artificial coloring matter was placed upon these coffees."

"That the coffees are not adulterated merely because they have been less merchantable than before or of less value."

"That the defendants cannot succeed unless they have affirmatively shown by a preponderance of evidence that the addition of the artificial coloring matter to the coffee has produced, as a matter of fact, one or more of the three results specified in the public health law, and that unless such an actual results exists, the goods are not adulterated whatever other results may have been accomplished, or whatever may have been the intent with which the coffees were colored."

"That the mere fact that the natural appearance of the coffees may have been changed by the coloring matter does not constitute adulteration under the statute."

"That the mere fact that the coffees may have been given a uniform appearance does not constitute adulteration."

"That the language of the statute: 'better than it really is or of greater value' means such treatment as may have been imparted to the coffees not merely in actual increase in value or in quality, but a fictitious increase in value or in quality."

"That in order to bring the case within the third alternative of the statute the defendants must affirmatively show:"

"1. The existence of actual damage in the coffees in question.

"2. That this damage was of such a nature as to be capable of concealment by the treatment applied to the coffees; and

126 "3. That such damage must have been actually concealed by such treatment."

"That concealment of damage means that it must be entirely hidden and not merely such partial concealment as still leaves it possible by the exercise of ordinary care to be discovered without removing the artificial coating," by the inspection of an ordinary eye.

"There is no claim that the substance used is harmful to health and that the jury must entirely disregard any such question." That means, gentlemen of the jury, that there is nothing before you that this powder, whatever it may be called, is hurtful to health. The question is whether it concealed damage or apparently enhanced value; we will hold to that strictly, if you please.

I am requested on behalf of the defendants to charge you:

"The question for the jury is not whether a licensed grader or a grade arbitrator of the Coffee exchange, or any expert in coffees, would be deceived as to the presence or as to the extent of damage in the coffees by such coloring as there was here, or would think that the coffee was better than it really was, or was of greater value by reason of the coloring, or would fail to notice the true extent of the damaged condition of the coffee; but on the contrary, the question is whether an untrained ordinary observer would be deceived and think the coffee better than it really was, or would think it was

of greater value than it really was, or would be unable to see the extent of the damage by reason of the coloring matter which had been applied to the coffee.

"The jury is instructed that the contract between these parties related to the sale and delivery of a food product for human consumption, and was therefore regulated by the statute of this
127 State against adulteration, which, so far as the present case is concerned, is as follows:

"That I have read to you gentlemen, and there is no necessity of repeating.

"The jury are instructed that it is conceded in this case that some two hundred and three bags out of the 500 bags tendered by the plaintiff to the defendants were artificially colored or coated over with a foreign substance, and that that foreign substance was in the nature of what is commonly called yellow ochre, and that that coloring or coating imparted a general yellowish appearance to the coffee."

It is for the jury to say whether on the proof which has been given before them the full and true extent of the damage of all kinds in the beans in this artificially colored coffee was, after the coffee had been artificially colored, just as apparent to an ordinary untrained observer as it would have been if the coffee had not been colored or covered with yellow coloring matter; and if they find that damage was concealed by the coloring matter placed upon the coffee, their verdict must be for the defendants."

"If the jury find as a fact that the effect of coloring such of these coffees as were artificially colored, was to conceal damage in some of the beans, then the coffee was adulterated within the meaning of the statute, and the jury must render a verdict for the defendants."

"That in order to justify the jury in finding a verdict for the defendants, it is not necessary for the jury to find that the coloring substance on the coffee concealed all the damage or all the defects in the coffee."

"That if the jury find as a fact that any material portion of the coffee tendered was colored or coated or polished or powdered whereby any damage was concealed, and the coffee was made to appear better than it really was or of greater value, then the jury can consider no other question but must render a verdict for the defendants."

128 "That the plaintiffs having called Mr. Lurman and Mr. Lee as their witnesses, the jury are not at liberty to disregard these witnesses, but these witnesses must be considered to be credible witnesses."

"That it is uncontradicted that there were in this coffee damaged beans and that such beans were of many different shades." But you must remember, gentlemen of the jury, just what this coffee was to be, and actually was; it was No. 9 coffee, which all the witnesses upon both sides say was a low grade coffee, and more or less damaged beans were found there and sticks and stones, and what perhaps might be called foreign matter, because it was low grade coffee?

If you find, from a consideration of the evidence, gentlemen, that these plaintiffs furnished a coffee which, although somewhat colored with a foreign substance or, as it has been called, this yellow ochre, that the covering was so transparent that there was no damage concealed and that it did not enhance the apparent value of this coffee, why then, your verdict will be for the plaintiffs to the amount of their claim, a memorandum of which I will hand you.

But, if you find, on the contrary, that this coffee was colored and was colored to such an extent as to conceal damage or to increase its value and therefore within the inhibition of this State law, then your verdict must be for the defendants.

Gentleman, these somewhat voluminous requests have each been marked, and each may take cross exceptions to the marking.

Mr. KELLOGG: I think your honor inadvertently fell into a slight error in speaking of Mr. Schilling's testimony. You said Mr. Schilling testified that the coating concealed defects; he testified just the contrary, said it did not conceal the defects.

The COURT: Yes; I did make a mistake there, gentlemen, a mistake resultant from a little lack of clearness in my minutes.

129 Mr. KELLOGG: One other suggestion; in speaking of the damaged beans of many different shades, I think it might not be unfair subject to your honor's opinion, to call the attention of the jury to the testimony of Mr. Lee; that because a bean was pale or yellow, it did not necessarily indicate that it was a damaged bean.

The COURT: Oh, yes, he so testified; I understood him so.

Mr. FOX: I beg your honor to allow me to call your attention to this; that in stating the testimony of Mr. Lee, your honor did not refer to the fact that Mr. Lee testified that, whatever the coloring matter was, it covered up all the defects; and there was some statement made about our lack of testimony; both Mr. Lee and Mr. Lurman testified that the samples now shown were not in the same condition as they were in 1894.

The COURT: Oh, they did.

Mr. FOX: It was an unintentional omission of your honor not to refer to Mr. Lurman's testimony?

The COURT: I did not hear anything in Mr. Lurman's testimony that exactly hit the point.

Mr. FOX: He said that he saw a substance which covered up some of the defects; he could see a black bean, but that he could not see the other damage. I did not want the jury to get the idea that you had passed that over.

The COURT: No, I have not passed over any testimony with any purpose. But I could not go through all this testimony generally; it would take me an interminable length of time. And I said, as you and counsel heard, I only referred to some points, and cautioned you not to be govered by my statement, but to rely upon your own memories; and that is as much as anybody is entitled to.

The requests to charge submitted by counsel for the plaintiffs were as follows:

130 "I. That the only question which the jury have to consider is whether the coffees were adulterated goods within the meaning of the public health law of New York."

Charged. M. B.

"II. That there is nothing in the contract binding the plaintiffs to tender the defendants natural or uncolored coffees."

Declined. M. B.

Exception taken by counsel for the plaintiffs.

"III. That the arbitration which has taken place is conclusive upon the point that the coffees tendered were a good delivery under the contract unless the defendants are able to show in this case that they were adulterated goods."

Charged. M. B.

"IV. That the burden lies upon the defendants to show affirmatively and by a preponderance of evidence that the coffees in question were adulterated coffees within the meaning of the New York statute."

Charged. M. B.

"V. That this statute is in derogation of the common law right of every one who owns property and is not to be extended beyond what can be fairly inferred from its terms."

Charged. M. B.

"VI. That the word 'adulteration' as used in this statute has simply the meaning which the statute gives it and that this meaning is not to be confused with any ordinary or common meaning of the word."

Charged. M. B.

"VII. That the mere fact that an artificial coloring matter was placed upon the coffees does not constitute adulteration under the statute."

Charged. M. B.

131 "VIII. That the jury are not to consider any intent or purpose with which the artificial coloring matter was placed upon the coffees."

Charged. M. B.

"IX. That the coffees are not adulterated merely because they have been less merchantable than before or — less value, (or because a defect has been added to them, by being artificially colored)."

Out. M. B.

Charged only as amended. M. B.

"X. That the defendants cannot succeed unless they have affirmatively shown by a preponderance of evidence that the addition of the artificial coloring matter to the coffee has produced, as a matter of fact, one or more of the three results specified in the public health law, and that unless such an actual result exists, the goods are not adulterated, whatever other result may have been accomplished, or whatever may have been the intent with which the coffees were colored."

Charged. M. B.

"XI. That the mere fact that the natural appearance of the coffee may have been changed by the coloring matter does not constitute adulteration under the statute."

Charged. M. B.

"XII. That the mere fact that the coffees may have been given a uniform appearance does not constitute adulteration."

Charged. M. B.

"XIII. That the language of the statute: 'Better than it really is or of greater value,' means such treatment as may have imparted to the coffees not merely an actual increase in value or in quality, but a fictitious increase in value or in quality."

Charged. M. B.

"XIV. That in order to bring the case within the third alternative of the statute the defendants must affirmatively show:

132 "1. The existence of actual damage in the coffee in question;

"2. That this damage was of such a nature as to be capable of concealment by the treatment applied to the coffees; and

"3. That such damage must have been actually concealed by such treatment."

Charged. M. B.

"XV. That the arbitration as to the grade of the coffee was conclusive upon the defendants not only as to the coffee being a good delivery under the contract but also that it was free from any adulteration within the meaning of the statute."

Not charged because needless under concession of def'ts' counsel. M. B.

Exception taken by counsel for the plaintiffs.

"XVI. That concealment of damages means that it must be entirely hidden, and not merely such partial concealment as leaves it possible by the exercise of ordinary care to be discovered without removing the artificial coating."

Charged. M. B.

"XVII. That the law looks with favor upon private arbitration."

Not charged for reason at No. 15. M. B.

Exception taken by counsel for defendants.

"XVIII. That the decision of private arbitrators upon questions of fact is binding upon both parties, unless clear proof is presented, showing fraud, bad faith or such mistakes as a clerical error."

Same as above. M. B.

Exception taken by counsel for plaintiffs.

"XIX. That in the present action the arbitration has not been attacked upon any legal ground whatever."

Same as above. M. B.

Exception taken by counsel for the plaintiffs.

133 "XX. That there is no claim that the substance used was harmful to health, and that the jury must entirely disregard any such question."

Charged. M. B.

The requests to charge submitted by counsel for the defendants were as follows:

"Seventh. The question for the jury it not whether a licensed grader or a grade arbitrator of the Coffee exchange, or any expert in coffees, would be deceived as to the presence or as to the extent of damage in the coffees by such coloring as there was here, or would think that the coffee was better than it really was, or was of greater value by reason of the coloring, or would fail to notice the true extent of the damaged condition of the coffee; but, on the contrary, the question is whether an untrained, ordinary observer would be deceived and would think the coffee better than it really was, or would think it was of greater value than it really was, or would be unable to see the extent of the damage by reason of the coloring matter which had been applied to the coffee."

Charged. M. B.

Exception taken by counsel for the plaintiffs.

"Eighth. The jury is instructed that the contract between these parties related to the sale and delivery of a food product for human consumption, and was therefore regulated by the statute of this State against adulterations, which, so far as this present case is concerned, is as follows:

'No person shall, within the State, manufacture, produce, compound, brew, distill, have, sell, or offer for sale, any adulterated food or product. An article shall be deemed to be adulterated within the meaning of this act' if it 'be colored or coated or polished or powdered whereby damage is concealed, or it is made to appear better than it really is or of greater value.'"

Charged. M. B.

134 Exception taken by counsel for the plaintiffs.

"Eleventh. The jury are instructed that it is conceded in this case that some two hundred and three bags out of the 500 bags tendered by the plaintiffs to the defendants were artificially colored or coated over with a foreign substance, and that that foreign substance was in the nature of what is commonly called yellow ochre, and that that coloring or coating imparted a general yellowish appearance to the coffees."

Charged. M. B.

Exception taken by counsel for the plaintiffs.

"Thirteenth. It is for the jury to say whether on the proof which has been given before them the full and true extent of the damage of all kinds in the beans in this artificially colored coffee was, after the coffee had been artificially colored, just as apparent to an ordinary untrained observer as it would have been if the coffee had not been colored or covered with yellow coloring matter; and if they find that damage was concealed by the coloring matter placed upon the coffee, their verdict must be for the defendants."

Charged. M. B.

Exception taken by counsel for the plaintiffs.

"Fourteenth. If the jury find as a fact that the effect of coloring such of these coffees as were artificially colored, was to conceal dam-

age in some of the beans, then the coffee was adulterated within the meaning of the statute, and the jury must render a verdict for the defendants."

Charged. M. B.

Exception taken by counsel for the plaintiffs.

"Fifteenth. That in order to justify the jury in finding a verdict for the defendants, it is not necessary for the jury to find that the coloring substance on the coffee concealed all the damage or all the defects in the coffee."

Charged. M. B.

135 Exception taken by counsel for the plaintiffs.

"Sixteenth. That if the jury find as a fact that any material portion of the coffee tendered was colored or coated or polished or powdered whereby any damage was concealed, and the coffee was made to appear better than it really was or of greater value, then the jury can consider no other question, but must render a verdict for the defendants."

Charged. M. B.

Exception taken by counsel for the plaintiffs.

"Nineteenth. That the plaintiffs having called Mr. Lurman and and Mr. Lee as their witnesses, the jury are not at liberty to discredit these witnesses, but these witnesses must be considered to be credible witnesses."

Charged. M. B.

Exception taken by counsel for the plaintiffs.

Additional requests on behalf of the defendants.

"A. That it is uncontradicted that there were in this coffee damaged beans and that such beans were of many different shades."

Charged. M. B.

Exception taken by counsel for the plaintiffs.

The jury returned a verdict in favor of the defendants.

Mr. KELLOGG: If the court please, I ask for a new trial upon all the grounds specified in section 999 of the Code, separately.

Motion denied. Exception taken.

Mr. FOX: We will take a modest allowance, with the court's approval.

The COURT: Five per cent.

Thirty days' stay after notice of entry of judgment and to make a case.

136 & 137 APPENDIX.

PLAINTIFFS' EXHIBIT No. 1.

NEW YORK, *July 7th*, 1894.

Sold for account of Messrs. W. H. Crossman & Bro., to Messrs. Theo. G. Lurman & Co., Baltimore, Md.

About (250—No. 8, 250—9) five hundred (500) bags Rio coffee, (sound and made sound portion) to be shipped at Rio de Janeiro by Str. *Catania*.

Coffee to average in grade about standard Nos. 8 & 9 of the Coffee Exchange of the City of New York. Sale price on a basis of 15 cts. per lb. for standard No. 8. No. arrival, no sale.

Mackey & Small. Terms.—Bill to date when coffee is all in store; basis, ninety days notes; payable in cash, as taken from warehouse, less discount at the rate of eight per cent. per annum for the unexpired time; full settlement in thirty days from date of bill.

Buyers to have first month's storage and fire insurance on this coffee free of expense. The coffee to be weighed as wanted by buyers within thirty days from date of bill; at the expiration of thirty days the remaining portion is to be weighed.

Grading.—The coffee is to be graded by Mackey & Small. Should their average grading be unsatisfactory to the buyer,
138 the latter shall, without delay, and at their expense, appoint a grader licensed by the Coffee Exchange of the City of New York, and in the event of his average grading differing from average grading first submitted to buyer, and the two graders not being able to adjust the difference, they shall mutually agree upon and name a third grader, also licensed, to act as arbitrator in the matter. All samples and the detailed gradings of the two first graders shall be submitted to the arbitrator, and the average grading named by him is to be accepted by seller and buyer as the basis for the sale price. The expense of the arbitration is to be paid by the party whose grader's average grading differs most from the average grading of the arbitrator. Differences in exchange grades to be those existing at date of this contract.

Buyers have privilege of calling for a grading on ship samples, subject to confirmation by samples drawn from bags on arrival of the coffee.

Memorandum Attached to Foregoing Contract.

Arbitration is to be had in accordance with the grading clause of the contract. It is understood and agreed that the graders or arbitrators to be selected shall be limited to the partners or employees of five firms, to be selected by the seller.

L. W. MINFORD & CO., *Brokers.*
W.

Described as flat bean coffee.
Across face: Accepted.

W. H. CROSSMAN & BRO.

139 PLAINTIFFS' EXHIBIT NO. 2 FOR IDENTIFICATION.

10,000 8/9s *Catania.*
100 9s —"—
2,000 7 *Etona.*

B
889.

2,000 No. 7 @ 14½ cts. per lb.)
10,000 " 8&9 " 13½ " " ")

NEW YORK, *June 12th*, 1894.

Sold for account of Karl Krische by Heiner Haase

To W. H. Crossman & Bro..... .....

(Subject to delays in or interruption of cable communication.)

About twelve thousand (12,000) bags Rio coffee to be shipped from Rio Janeiro by one of the first available steamers (name of vessels to be given as soon as known) at 14½ & 13½ cents per pound, cost and freight to New York, basis of exchange standards Nos. 7, 8, & 9, Café de Tempo.

The invoice to be made at 132 pounds per bag, and pound sterling to be computed at $4.86. Buyers to furnish usual London bankers' credit. Coffee to average in grade about said standards No. 7, 8 & 9. Any difference either above or below said standard to be paid by buyers, or allowed by sellers, as the case may be.

The coffee is to be graded by Mackey & Small. Should their average grading be unsatisfactory to the buyer, the latter shall, without delay, and at their expense, appoint a grader licensed by the Coffee Exchange of the City of New York, and in the event of his average grading differing from average grading first submitted
140 to buyer, and the two graders not being able to adjust the difference, they shall mutually agree upon and name a third grader, also licensed, to act as arbitrator in the matter. All samples and detailed gradings of the two first graders shall be submitted to the arbitrator, and the average grading named by him is to be accepted by seller and buyer as the basis for the sale price. The expense of the arbitration is to be paid by the party whose grader's average grading differs most from the average grading of the arbitrator. Differences in exchange grades to be those existing at date of this contract.

If, on arrival of steamer named, the shipment is found on inspection not up to the description as given in this contract, the seller has the option to substitute spot coffee from other cargoes, in accordance with contract grade and description, unless the buyer agrees to take the coffee at a fair allowance. No arrival, no sale.

Grading & arbitration clause attached. Café de Tempo or flat bean is based on N. Y. Coffee Exchange standards.

Accepted, pp.

HEINER HAASE.
FRED SOLGER.
MACKEY & SMALL, *Brokers.*

Slip attached to face of contract read as follows:

Arbitration is to be had in accordance with the grading clause on the contract. It is understood and agreed that the graders or arbitrators to be selected shall be limited to the partners or employees of five firms to be selected by the sellers.

PLAINTIFFS' EXHIBIT GG.

Original Invoice of Importation Taken from the Custom House Files.

The following is an abstract thereof:

141 The papers offered in evidence were the original papers from the custom house. They were the original invoices of importation of the coffee in question, duly declared before the consul general in Brazil, showing the amount of coffee, value, etc., the entry number in the New York custom house being 117404. The papers bore the following endorsements:

"Coffee free Aug. 16, 1894. J. McC. F.
Approved.
J. R. F., *Dep.*
WALTER H. BUNN, *Appraiser.*"

J. McC. F. being the initials of J. McC. Farrington, examiner at that time and J. R. F. being the initials of J. R. Fay, assistant appraiser at that time. The date (Aug. 16, 1894) indicates the day on which the coffee was entered at the custom house and a permit issued for the delivery of the coffees to the consignees, and the various initials were the equivalents of the signatures of the various officials mentioned and were affixed on that day. This statement of the contents of the paper is printed in lieu of the copying of the exhibits, by stipulation.

PLAINTIFFS' EXHIBIT GG & HH.

Memorandum.

To Messrs. Theo. Lurman & Co., Balto., Md. From W. H. Crossman & Bro., 77 & 79 Broad street.

NEW YORK, *Aug.* 13, 1894.

DEAR SIRS: We beg to confirm our telegram of to-day advising arrival of s/s *Catania* with 500 bags Rio 8/9 sold you under contract of July 17, '94.

The vessel commenced to discharge this afternoon.

Yours truly, W. H. CROSSMAN & BRO.

PLAINTIFFS' EXHIBIT X.

(*Telegram.*)

AUG. 15, 1894.

To W. H. Crossman & Bro., 77 Broad St., New York.

Samples our purchase fifteen hundred *Catania* have been tendered us by Lawrence & Crane. The seven hundred fifty eights are
142 satisfactory, but must decline to accept coffee tendered for nines being colored and damaged and far below grade purchased.

Please substitute other coffees.

(Signed) THEO. G. LURMAN & CO.
H. M. WAGNER & CO.
W. K. CARSON & CO.

PLAINTIFFS' EXHIBIT JJ.

BALTIMORE, *August 15th*, 1894.

Messrs. W. H. Crossman & Bro., New York.

DEAR SIRS: Your favor 13th instant duly received. Please advise us when the *Catania* coffee is in store as we wish to pay for the 250 bags coffee tendered for eights under contract of July 17th, 1894, but as advised yesterday we must decline to accept the coffee tendered for nines and await your substitution of other lots. We want to know whether our proffer to pay you for the eights is in accordance with your views as we do not wish to get into any disagreeable complication with you owing to our rejection of your proffer of the so-called nines. We submit a chop list of the 250 bags we desire to pay for which we received from Messrs. Lawrence & Crane.

Yours very truly, THEO. G. LURMAN & CO.

W. H. C.	120—	21
L.	121—	8
	122—	18
	123—	16
	124—	13
	125—	6
	126—	2
	127—	10
	128—	15
143	129—	45
	130—	126
	250	bags.

PLAINTIFFS' EXHIBIT KK.

BALTIMORE, *August* 15*th*, 1894.

Messrs. W. H. Crossman & Bro., New York.

DEAR SIRS: We confirm our telegram of date as follows:

"Samples our purchase fifteen hundred *Catania* have been tendered us by Lawrence & Crane, the seven hundred fifty bags "eights are satisfactory but must decline to accept coffee tendered "for nines being colored and damaged and far below grade purchased. Please substitute other coffee."

As stated above, coffee tendered for No. 8 is satisfactory but we must decline to accept coffee tendered us for No. 9, being unmerchantable and far below grade sold. We bought the coffee in good faith and we feel quite sure that you will correct the mistake.

Yours truly, THEO. G. LURMAN & CO.

P. S.—The above telegram was signed by Messrs. W. K. Carson & Co. and H. M. Wagner & Co., as the fifteen hundred bags were intended to be divided between these two firms and ourselves.

T. G. L. & CO.

PLAINTIFFS' EXHIBIT Y.

(*Telegram.*)

8/15, 1894.

Received at No. 2, Donnell building, 305 P.
Dated T. x N. York, 15.

To Theo. G. Lurman & Co.:

In reply to your telegram also signed by Wagner &
144 Carson, beg to say that neither you as buyers nor we as sellers decide whether coffee according to contract, this entirely left decision impartial brokers.

CROSSMAN.

PLAINTIFFS' EXHIBIT LL.

W. H. Crossman & Bro.,
Cable address,
"Crossman."

NEW YORK, *August* 16, 1894.

Messrs. Theodore G. Lurman & Co., Baltimore, Md.

DEAR SIRS: We duly received your letter and telegram of yesterday, contents being duly noted. As stated in our telegraphic reply to the latter, the quality of the coffee in question has to be determined on the usual examination and grading of the brokers, and cannot be arrived at by you as buyers or ourselves as sellers apart from the brokers. We bought the coffee in Rio and the quality on our contract is subject to the grading of Mackey & Small for the

sellers, and in due course we shall submit to you the finding of these gentlemen. It is not of course within our province to state now how the grading of our brokers may compare with that of Mackey & Small, and can only say that it is our intention to get what we bought the same as you desire to do. We would add, however, that the quality of 8s & 9s at the time, was sold at a considerable discount on the price of 7s & 8s, and therefore the buyers cannot expect that the quality of 8s and 9s which were bought at such a wide difference on the price, shall be of a superior quality to what they usually run.

We shall address you again in the matter as soon as possible.

Yours very truly, W. H. CROSSMAN & BRO.

145 PLAINTIFFS' EXHIBIT MM.

W. H. Crossman & Bro.,
Cable address,
"Crossman."

NEW YORK, *Aug.* 29, 1894.

Mess. Theo. G. Lurman & Co., Baltimore, Md.

DEAR SIRS: Noting that Mess. Mackey & Small's gradings of your *Catania* purchase are not satisfactory to you, we beg to give you below names of five licensed graders from which, according to terms of the contract, you will kindly select one to represent you:

Mr. J. D. Picksley.
Mr. Schilling.
Mr. Allan McDougall.
Mr. A. Reamer.
Mr. I. A. Sprague.

Yours very truly, W. H. CROSSMAN & BRO.

PLAINTIFFS' EXHIBIT NN.

W. H. Crossman & Bro.,
Cable address,
"Crossman."

NEW YORK, *Sept'b'r* 20, 1894.

Messrs. Theodore G. Lurman & Co., Baltimore.

DEAR SIRS: In answer to your letter of 19th inst. with which you return our bill for coffees ex *Catania*, we request you to immediately instruct your grader to select an arbitrator, as you are aware that all the decisions concerning this matter by the Coffee exchange direct you to comply with the contract, and whether, in your
146 estimation, the coffee is an invalid delivery or not is of no importance, since it has been shown that as regards a good or bad delivery, or anything else affecting the contract the matter has to be determined according to the terms of same, and not on the views of either buyer or seller.

Yours very truly, W. H. CROSSMAN & BRO.

P. S.—We also request you to make us payment at once as per contract, the time for settlement having expired on 17th instant.
Bill returned herewith.

PLAINTIFFS' EXHIBIT UU.

Testimony of Theodor G. Lurman on First Trial. S. M., pp. 136, '7, '8.

Q. When you sent that message Mr. Crossman answered saying that was a matter for the graders to decide, did he not?
A. He did.
Q. That being so, you still refused then to submit it to grading?
A. I did.
Q. Why did you refuse to submit it to grading after you knew Mr. Crossman took the position the graders ought to decide that question?
A. Because the coffee was so abominable that I wished the matter settled as to its being unmerchantable before they proceeded to grade it.
Q. Do you mean to say that the graders—these experts were incapable of ascertaining the coffee's qualities?
A. There had been so much——
Q. Cannot you answer the question yes or no?
(Question repeated.)
A. I think they were perfectly capable; I thought they were perfectly capable to do so.
Q. Do you mean to say you thought they would not do so?
A. I feared that.
Q. You had not then appointed any grader?
A. No.
147 Q. You knew that an arbitrator would be appointed or selected by the two graders after you had appointed one and Mr. Crossman appointed the other?
A. I do not understand.
Q. You knew that if an arbitrator was appointed it would be some person appointed by the two graders?
A. I did.
Q. Did you know who was going to be appointed arbitrator?
A. It was one of five names and Mr. Crossman——
Q. Do you mean to say that you knew or was certain that any five arbitrators that Mr. Crossman might name would swindle you?
Mr. STICKNEY: I object as entirely improper.
The COURT: You may leave out the word swindle.
Q. Strike out the word swindle, and substitute "would do you an injustice?"
A. Yes, sir.
Q. Had Mr. Crossman then named any people?
A. He had the selection of the five.

Q. Had he then named any?
A. He named Mackay and Small.
Q. Had he named any of the five people who were to arbitrate or were they selected?
A. Yes, sir.
Q. At that time?
A. It was in the contract.
Q. Had he named any such people at that time, whether he had a right to do so by the contract or not?
A. Yes, he had named five at that time.
Q. At what time; at the time you first rejected the coffee?
A. No, not the first day
Q. Had he done it the second day?
A. I cannot tell whether the third day or the fourth day or the exact day, but he had named five.
Q. Is it not a fact that he did not name the five graders until August 29th, 1894, which was fourteen days after the coffee was received and rejected by you? and is not that a copy of his letter in which he names the five (showing letter to witness of August 29th, 1894)?
A. That is the letter.
148 Q. So that was two weeks after the time you got the samples, fourteen days?
A. It was.
Q. Do you wish to have us understand that you were satisfied in advance that before Mr. Crossman named any graders that he would certainly name five from which the arbitrators should be selected, any one of whom would do you an injustice?
A. That is I feared they would do me an injustice.

Plaintiffs' Exhibit VV.

Testimony of Theodor G. Lurman on First Trial. S. M., pp. 145, '6.

Q. What was it in particular that made you reject this shipment?
A. The fact that it was abominable stuff.
Q. The fact that it was of high or low market value?
A. The market had nothing to do with it?
Q. I am talking about its value. You say the market had nothing to do with it?
A. Nothing whatever.
Q. What do you mean by saying it was miserable stuff unless the market had something to do with it?
A. I said abominable.
Q. What do you mean by that unless the market had something to do with it?
A. It was rain damaged coffee smeared with coloring matter.
Q. What did you mean by saying abominable stuff; do you mean abominable to keep in your warehouse or abominable to sell in the market?

A. Abominable to sell in the market.
Q. The market did have something to do with it then?
A. None whatever.
Q. Although you bought it to sell in the market, that is your best answer to that question?
A. If it had been sound coffee I would be willing to take it and not ask Mr. Crossman to give me sound coffee in place of it.

149 PLAINTIFFS' EXHIBIT WW FOR IDENTIFICATION.

Testimony of Theodor G. Lurman on First Trial. S. M., p. 152.

By Mr. KELLOGG:

Q. Glance at this letter I show you and see whether it refreshes your recollection as to the date when you heard of the New York statute?
A. That must have been the date.
Q. What is that date?
A. That is August 28th.

PLAINTIFFS' EXHIBIT XX FOR IDENTIFICATION.

Testimony of Benjamin D. Williams, 84 to 110, S. M., 1st Trial.

BENJAMIN D. WILLIAMS, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Q. Mr. Williams, you are one of the defendants in this action?
A. Yes, sir, I am one of the defendants.
Q. How long have you been in the firm?
A. I was in the firm for thirteen years.
Q. Are you not now with the firm?
A. I am not now a member of the firm.
Q. Were you a member of the firm in the year 1894?
A. I was, sir.
Q. At the time of this controversy with the firm of Crossman and Brother?
A. I was, sir.
Q. At what date did these coffees first come under your inspection?
A. August, 1894.
Q. Can you fix the precise date?
A. I think about August 15th.
Q. Did you make an examination of the samples then?
A. I did, sir.
Q. How long has been your experience in the coffee trade?
A. I have been identified with coffee for about twenty-five years.
150 Q. How large an experience in buying and selling have you had in that line?
A. Quite large sir.

Q. Did you examine the samples of coffee in controversy here?
A. I did, sir.
Q. What did you find to be the condition of the coffee as to whether or not it was artificially colored?

Mr. KELLOGG: Same objection as to the previous testimony of the same nature.
The COURT: Same ruling and exception.

A. I found certain chops were artificially colored.
Q. How many to the best of your recollection?
A. Five.
Q. How large a quantity in each chop?
A. I cannot say without referring to the chop list; quite a number of them.
Q. Give it as nearly as you can from recollection?
A. In the neighborhood of five hundred bags.
Q. What did you do with the coffee; did you have an examination made?
A. I examined it, sir.
Q. Yourself?
A. Yes.
Q. Did you then have an examination made by anybody else, an expert or chemist?
A. We had an analysis made by a chemist.
Q. Who was he?
A. Mr. Lehman.
Q. Did he make a report to you?
A. He made a report to the firm, sir.
Q. Will you look at this paper and see if you identify that?
A. I do sir.
Q. What paper is that?
A. This is a report or certificate of the analysis.
Q. By whom?
A. By Mr. Lehman.
Q. When was that delivered to your firm?
A. About August 25th, sir; it bears date August 25th, and I imagine it was delivered that day; possibly not until the next day. I am not prepared to say.
Q. You declined to receive those coffees or a portion of them on the ground of their being artificially colored?

151 Mr. KELLOGG: I object to that.
Mr. STICKNEY: Then we will put in the original correspondence. We will put in the certificate.
Mr. KELLOGG: I object, I think Mr. Lehman has given the best evidence on that point.
The COURT: Objection sustained.
Exception by the defendant.

Q. You had communications of one kind or another for some time

after the point of time you have just mentioned, with Messrs. Crossman & Brother about these coffees?

A. We did sir.

Q. As far as your knowledge goes did Messrs. Crossman & Co., or any member of their firm ever make an assertion to your firm or take the position to your firm that these coffees were not artificially colored.

Mr. KELLOGG: If the question of what was said and done in the correspondence is material, the correspondence itself ought to be put in evidence, and not questions asked as to what they did or did not do.

Objection sustained. Exception by the defendant.

Cross-examination by Mr. KELLOGG:

Mr. KELLOGG: I offer in evidence the correspondence between the plaintiffs and the defendants with reference to the delivery of the coffees now in question.

Mr. STICKNEY: Part of those are only copies but we assume they are correct for the time being. The copies are subject to correction by either party.

Same marked Plaintiffs' Exhibit D.

(Here begins the testimony particularly offered by Mr. Kellogg as pages 88 to 90 inclusive of the same testimony.) See folio 456 of this record, *supra*.

PLAINTIFFS' EXHIBIT Y FOR IDENTIFICATION.

Q. Mr. Williams, during the time you were a member of
152 the defendants' firm what was the nature of your business?

A. Importers and jobbers of coffee sir.

Q. Where did you sell coffees which you handled, what part of this country?

A. We sold them from Maine to Florida and from Denver to the coast—the Atlantic coast.

Q. Was a considerable portion of your trade the southern and southwestern trade?

Q. Principally the western trade.

Q. Did you do some southern business and some southwestern business?

A. We did some southern business, yes.

Q. Did your firm during this period which you were with it deal in polished or colored coffees?

A. A portion of the time we dealt in them.

Q. What portion of the time?

A. We did not deal in colored coffees after this controversy arose.

Q. The controversy with Crossman?

A. The controversy with Crossman.

Q. You did not deal in colored coffees after that time?

A. No, sir.

Q. Was it just about the time of the controversy that you stopped dealing in those coffees?

A. It was about the time of the controversy that we discontinued dealing in colored coffees.

Q. Why was that?

A. Because we did not approve of it.

Q. You did not approve of it?

A. No, sir.

Q. On what grounds?

A. We thought it was deception.

Q. You therefore stopped dealing in such coffees?

A. In colored coffees.

Q. What particular point was it that occurred, if any, which brought to your mind then that dealing in colored coffees was deception?

A. Ask the question again.

Q. How did you happen to realize just then that dealing in colored coffees was deception?

153 A. I cannot say we realized just at that time it was deception.

Q. How did you happen to stop at that time?

A. Because we thought it was feasible to stop.

Q. What was the reason you thought it feasible to stop?

A. Because it was deception.

Q. Why was it you had not realized it was deception before that time?

A. (No answer.)

Q. What I want to get at is why you stopped at just this particular time, Mr. Williams?

A. We stopped because we thought it was deception and it was not consistent.

Q. Not consistent with what?

A. We did not think as we had declined to accept the colored coffees that were tendered by Messrs. Crossman under the contract which has been referred to, that it was consistent for us to continue the sales of colored coffees.

Q. So it was because of your controversy with Crossman that you stopped handling colored coffees at that time?

A. It was in a measure, yes.

Q. It was after the controversy with them that you realized it was deception?

The COURT: He answered that. He said he thought after the controversy that it would be inconsistent.

Q. That is the reason you stopped at that time and that is the best answer you can give?

A. That is the reason, yes.

(Here ends the testimony particularly offered by Mr. Kellogg as pages 88 to 90 inclusive.)

Q. How many years before that time had you been dealing in colored or polished coffees?
A. I could not say, sir.
Q. Ten years?
A. I do not think so; we never handled colored coffees except to a very limited extent. I make a distinction between colored and polished coffees.
Q. What is the distinction between polished coffees and colored coffees?
154 A. The distinction which I make between colored coffees and polished coffees is that polished coffees are polished with soapstone while colored coffees are colored with coloring matter; the effect of polishing coffee——
Q. Never mind the effect. Is that the distinction you make?
A. That is the distinction I make.
Q. Don't you know outside substances beside soapstone are used in polishing coffees?
A. Not in polishing coffees.
Q. Don't you know in connection with polishing and milling sometimes substances like charcoal and lampblack are used?
A. Not in polishing or milling coffees.
Q. You are positive of it?
A. Yes.
Q. Did you hear the testimony of the previous witness?
A. Yes.
Q. Do you disagree with his statement as to that?
A. I disagree with him that any foreign substance other than soapstone is used in polishing coffee.
Q. Why do you draw the line at soapstone?
A. Because there is not anything else used to the best of my knowledge in polishing coffee.
Q. Are you a coffee polisher?
A. I am not, sir.

Here begins the evidence separately offered by Mr. Kellogg and designated as beginning on page 92 and extending through page 93, from the same record. (*See fol. 457 of this record, supra.*)

PLAINTIFF'S EXHIBIT YY FOR IDENTIFICATION.

Q. Have you had much coffee polished?
A. We have had some coffee polished, I cannot say how much.
Q. Much of it; a considerable quantity?
A. Extending over the period of my connection with the firm there was more or less polished.
155 Q. A considerable quantity, wasn't it?
A. Not of late years.
Q. Well, before late years—before the controversy arose?
A. I do not date the time of the decline in our sales of polished

coffees from the date of this controversy because the date of the decline in polished coffee I think was probably prior to that.

Q. What do you mean by decline in polished coffee?

A. I mean when there was not the same demand for polished coffee; that is, that there was fifteen years ago or ten years ago.

Q. Not the same demand?

A. No, sir.

Q. Do you think the realization of the sin of selling polished coffees was brought about by the lack of demand in any degree, Mr. Williams?

A. What is that?

Q. Do you think the decline of the demand for polished coffees accounts at all for your sudden realization of the fact that it was sinful to do business in it?

A. No, sir, I cannot say I do.

Q. Can you say that you do not?

A. I can say, as I said before, in my judgment the decline in polished coffees dates prior to 1904.

Q. Since that time you have ceased handling polished coffees?

A. We have ceased handling polished coffees.

Q. Was there a decline in the demand for colored coffees?

—. I cannot say because we were not handling them.

Q. But you had handled them before that time, had you not?

A. We had to a limited extent.

Q. Had there been prior to that time, any decline in the general demand for polished, coated or manipulated coffees?

A. I think there had.

Q. I wish you would tell me to your best recollection which portion of your general business prior to this controversy was in
156 polished or colored coffee; that is, in a general way?

A. I could not assume to tell you what percentage, but a very small percentage.

Here ends the evidence separately offered by Mr. Kellogg from pages 92 to 93.

Q. Five per cent.?

A. I cannot say.

Q. Cannot you say something about it whether twenty-five or fifteen?

A. I cannot tell without referring to our books.

Q. Cannot you give me any idea at all?

A. I would not like to make a statement, no, sir. Not as to any definite amount without referring to our books.

Q. Would it take you a week to refer to your books on that?

A. I don't know how long it would take.

Q. With regard to the system of polishing coffee again; have you ever had anything to do with that business yourself?

A. In what way?

Q. Are you personally familiar with the method used in polishing coffee?

A. I cannot say I am, but I am somewhat familiar with it; I never polished coffee myself, no sir.

By the COURT:

Q. Did you ever see it done?
A. Yes, I have seen it done; I have been in the mill where it was being done.

By Mr. KELLOGG:

Q. Have you become familiar with the systems of polishing coffee; all the various ways in which coffee is polished?
A. No, sir.
Q. So that you do not know about those other systems?
A. I know of some systems, but I cannot say I know of all systems.
Q. You are not an expert in polishing coffees?
A. I would not call myself an expert in polishing coffees.
Q. Do you recall my inquiries addressed to Mr. Dall with regard to the previous cargo of the same kind of coffee that was received by you some time before this controversy arose, some years before?
A. I heard the question, yes.

Q. Do you know anything about the circumstances of that
157 transaction?

A. I do not remember any of the particulars with reference to that transaction.

Q. Do you remember that there was such a transaction; that your firm did import such an installment or cargo of coffee?
A. We might have imported it.

By the COURT:

Q. Do you remember it?
A. If there was——
Q. Do you remember it?
A. I have no positive recollection, no, sir.

By Mr. KELLOGG:

Q. Don't you know that you did import such a cargo?
A. I don't sir.
Q. Have you no personal knowledge at all about it, from your own personal knowledge?
A. I cannot say that I have, no, sir, to the best of my knowledge it was some years ago if there was.
Q. If there was?
A. Yes.
Q. Then you know there was such a transaction?
A. I believe there was, yes.
Q. What is the foundation of your belief, Mr. Williams?
A. In various conversations that have arisen in reference to this controversy I remember that an invoice of coffee—it was an invoice to the best of my knowledge—was referred to.

Q. Have you any real doubt in your mind of there having been such a transaction—such an importation by your firm?

—. I would not say there was not, no, sir.

Q. You would not say there was, would you, Mr. Williams, any doubt in your mind about it?

A. I would say that I have no recollection except in connection with the conversation that I have referred to.

Q. But in that connection, you have a recollection of it?

A. Yes.

Q. That cargo which was imported was sold to the trade after its importation?

A. I don't remember whether it was sold before or after.

Q. It was sold, wasn't it?

A. Yes, sir.

Q. It was not given away?

A. No, sir, it was sold.

158 Q. Either before or after it arrived?

A. Yes.

Q. Mr. Williams, I call your attention to a telegram in evidence and I ask you to look at this telegram and say whether you recall its sending?

A. I recall this telegram, yes.

(Telegram read to the jury.)

Q. Mr. Williams, this telegram was sent very shortly after you received the ship's samples?

A. By the firms.

Q. By those three firms who signed it?

A. Yes.

Q. Will you tell me why that telegram was sent so soon after the receipt of the samples?

A. Because we discovered a portion of the coffee was colored, and we declined to accept it.

Q. Did you not know that your contract provided for its being graded?

A. Yes, sir.

Q. Why did you take it upon yourself to refuse to accept that coffee in advance of any chance of its being graded?

A. We did not consider it good delivery.

Q. Was not that for the grader to decide?

A. No, sir, I think not.

Q. In ordinary cases have you not been in the habit of leaving those matters to the graders?

A. Yes, I think we did.

Q. What I want to know is why you make any difference in this case?

A. Because this coffee was colored.

Q. But you had handled colored coffees for many years before.

A. Only to a limited extent.

Q. But to a certain extent at any rate?
A. Yes.
Q. Why did you make a distinction between this case and other cases whether few or many, where you handled colored coffees?
A. Because when we handled colored coffees the coffees were sold on sample. We bought this to be graded on the basis of New York Coffee Exchange types.
Q. Don't you know the New York Coffee Exchange types
159 do not refer to adulterated coffees?
A. I do not.
Q. The New York Coffee Exchange is not in business to handle adulterated coffees against the statutes of New York?
A. I should think not.
Q. Then why did you not allow the graders of the Coffee exchange—the licensed graders—referred to in the contract, to pass upon the coffee before you rejected it; why were you in such a terrible hurry?
A. We did not think it was a good delivery and we asked for the substitution of other coffee.
Q. Why did you not allow the licensed graders to decide that?
A. Because we thought we were competent ourselves.
Q. Did you think the graders were incompetent?
A. We did not think it was a good delivery and we did not think it could be delivered under the contract.

By the COURT:

Q. Did you think the graders were incompetent?

By Mr. KELLOGG:

Q. Did you think the graders were incompetent to find out that fact?
A. At that time it had not passed through the graders.

The COURT: Strike that out.

Q. (Question repeated):
A. No, not incompetent.
Q. Did you think they could find it out?
A. I think they could find out it was colored.
Q. Then why did you take it upon yourself out of the ordinary routine of business to decide it in advance of the grading?
A. Because we considered the coffee was not a good delivery. We bought natural coffee and this was colored coffee.
Q. Is that the only reason you can give for not having allowed the grading to go on as ordinarily?
A. That is the only reason, yes. That we did not consider the colored coffee that was tendered good delivery so we declined to receive it.
160 Q. Whether or not the graders called it a good delivery?
A. Whether or not the graders called it a good delivery we declined.

Q. You were aware of the fact that under the contract you had power to appoint a grader as well as the plaintiffs?

A. Yes.

Q. And you had a right to appoint your own grader did you not?

A. To the best of my knowledge.

Q. There is no doubt about it?

A. I think I am correct in stating we had to accept one grader that was suggested by the sellers.

Q. Mr. Sprague was a satisfactory person to you when you appointed him?

A. Mr. Sprague was satisfactory, yes.

Q. You were aware also of the fact that under the contract the two graders if they did not agree had to appoint a third party as arbitrator?

A. That is on the grade of the coffee but not on the condition of the coffee.

Q. You were aware of that fact in the contract?

A. I am aware of the fact as applied to grading.

Q. You were aware of the fact?

A. Yes.

Q. You did not wish to leave this question at all to either the graders or arbitrator even if they were to be appointed by you?

A. Not so far as the coffee being good delivery under the contract, no, sir.

Q. You were not?

A. No, sir.

Q. Now, the grounds of your rejection of the coffee are stated in the telegram and letters which were sent between yourself and the plaintiffs are they not?

A. I believe they are, yes, sir.

Q. You have seen the telegram?

A. Yes.

Q. Did you draw a distinction just now between the condition and quality of the coffee; you said you were willing to trust the graders for something or other, but you were not willing to trust them as to the condition?

A. I said we were willing to trust the graders as to the classification of the coffee.

161 Q. But not as to the condition?

A. Not as to the condition, no, sir.

Q. Don't you know that graders in determining the classification of coffee have to look at the condition of the coffee and at its quality and the various other points connected with it, manipulations, &c.?

A. Graders in classifying coffees should take into consideration the imperfections of the coffee beans.

Q. They take into consideration the condition of the coffee, don't they?

A. (No answer.)

Q. They take into consideration the condition and quality of the coffee in grading coffee?

A. I am not a licensed grader so I cannot state.

Q. Is there any doubt in your mind as to that point?

A. What is that, sir?

Q. That they take into consideration the quality and condition of the coffee?

A. I should think they would take into consideration the grade of the coffee.

Q. How would they get at the grade? What does the grade mean if it does not mean the condition, quality and other characteristics of the coffee?

A. You might take a lot of coffee as damaged and grade that.

Q. But don't graders have to take into consideration the damage if they do grade it to find ou- whether it is too badly damaged to grade or only slightly damaged, &c., don't you know that as a matter of fact?

A. I suppose they do. I cannot say, I am not a grader, sir.

Q. The gentleman who signed that telegram with you were Messrs. Carson & Co., and Messrs. Wagner & Co.?

A. Yes, sir.

Q. They had made similar contract to yours for other portions of this same coffee?

A. They had made contracts for coffee to arrive by the Catania.

Q. Their contracts were duplicates of yours as to grade, &c., except they referred to different bags; they were associated with you; you were acting together?

162 A. I cannot say that we were acting together; we bought some, and Mr. Carson bought some and Mr. Wagner bought some.

By the COURT:

Q. Were the purchase of all three similar in conditions except as to the quantity ordered?

A. I think the contracts were the same, sir.

By Mr. KELLOGG: And the samples tendered were the same to these other parties—the same quality of coffee; all one shipment by the Catania?

A. I cannot say, sir, whether all were the same or not; some were the same.

Q. They all joined in this telegram which stated the same grounds of rejection?

A. Yes; then they were all the same.

Q. Do you know what Messrs. Carson & Co., did afterwards with regard to their purchase?

A. To the best of my knowledge, after a good deal of controversy they decided to accept the purchase.

Q. You have said in your direct examination that the five hundred bags of your order were imperfect coffee according to your view?

A. Not of our individual order, sir.

Q. You did not mean that the five hundred bags all of your contract were bad?

A. Certainly not.

Q. How much do you claim to have been bad of your delivery or tender or whatever you call it?

A. I would have to refer to the chop list in order to tell you.

Q. Less than that you claimed to be bad?

A. Less than that. Yes.

Q. This coffee which was called for was eights and nines so called of the Coffee exchange?

A. Yes.

Q. You offered to accept the eights and reject the nines?

A. We offered to accept all the coffee that was not colored.

Q. That as you claimed, were the eights?

A. Yes, sir, the eights.

163 Q. Eights are higher grade than the nines?

A. Eight is the highest.

The COURT: Answer it yes or no.

The WITNESS: Yes.

Q. Did you have any conference or communication with Mr. Sprague, your grader, either your firm or you personally, with reference to what he should do as grader?

A. If we had, sir, I have no recollection of it.

Q. Who had charge of this matter; who of the members of your firm, had charge of your interest?

A. Mr. Lurman.

Q. You did not have the particular charge of it?

A. No, sir.

Q. Do you recall any communications with Mr. Sprague in regard to this matter as to what he should do?

A. Nothing of a definite nature, no, sir.

Q. Do you recall anything of any nature whether definite or otherwise?

A. There was some correspondence with Mr. Sprague.

Q. Do you recall any communications or correspondence with Mr. Sprague, definite or otherwise on this subject?

A. I know we wrote to Mr. Sprague in reference to the matter.

Q. In reference as to what he should do in the matter?

A. No, sir, with reference to grading this coffee; in reference to the coffee that had been tendered.

Q. What reference did you make to this coffee when you wrote Mr. Sprague?

A. I cannot say.

Q. Cannot you give us some idea?

A. Not without referring to the correspondence.

Q. You cannot recollect anything about it?

A. Not of a definite nature.

Q. Mr. Williams, did you at first consent to the arbitration and then afterwards withdraw that consent?

A. Not to my recollection.

164 Q. Are you sure that you did not?

A. I am positive, sir, to the best of my recollection, we never consented to receiving this coffee.

The COURT: Strike it out; listen to the question.

Q. (Question read as follows:) Mr. Williams, did you at first consent to the arbitration and then afterwards withdraw that consent?

A. To the arbitration?

Q. I should state to the grading?

A. Not to my knowledge.

Q. Did you at first appoint Mr. Sprague to grade the coffees and after he had done so and made his report repudiate his act?

A. Not to my knowledge.

Q. Did you repudiate your consent as to the arbitration of Mr. Schilling after that consent had been given—withdraw it?

A. No, sir, not to my knowledge.

Q. Do you know whether or not you repudiated what Mr. Sprague had done for you after he did so; are you positive about that that you did not repudiate what Mr. Sprague had done for you after it had been done, in grading these coffees?

A. I cannot say, sir, I am not positive.

Re-direct examination by Mr. STICKNEY:

Q. Mr. Williams, you have testified in answer to Mr. Kellogg's question that there was some instances when you dealt in colored coffees; how much did that amount to according to your best recollection?

A. I could not say because——

Q. Give us your best knowledge; what proportion or how often or how many of those dealings did you have; how much of it was there?

A. A very small proportion, but I could not say how much because I don't know.

Q. When you did deal in them what was the method of dealing?

A. We had the coffees—we sold them the coffees on sample.

Q. On sample?

A. Yes.

165 Q. You have been asked about some coffee or about one particular shipment. When did you first have this matter of that shipment, whatever it is, brought to your attention?

A. To the best of my recollection it was about the time that this controversy commenced.

Q. What did you understand my question to be; did you understand me to be asking when the shipment was?

A. No; when the reference was made to the importation which you referred to.

Q. What do you know about that importation?

A. I cannot say that I know anything.

Q. Did you have anything to do with it yourself; tell the jury all that you know about it?

A. I am aiming to tell the jury just what I know.

The COURT: Strike that out.

Q. Tell them all you know about it?

A. I cannot say that I know anything.

Q. Did you have to do with it at the time it was made personally?

A. I do not remember, sir; to the best of my recollection I had not.

Q. Can you tell us when it was?

A. Where it was?

Q. No, when?

A. No, sir, I cannot say.

Q. Do you remember what party or firm or person was the other party to the transaction?

A. I do not, sir.

Q. Did your firm sell the cargo or buy it or both?

A. I think we bought it from E. S. Nicholson & Co.

Q. Who were they?

A. Shippers.

Q. What did you do with it, sell it?

A. Yes, we sold it.

Q. To whom?

A. I don't remember.

Q. Was there any difficulty about it; did anybody make a claim against your firm in relation to it?

A. My recollection is that there was some question raised in reference to the coffee and we substituted other marks for it.

166 Q. You submitted other coffee for it?

A. Yes.

Q. What was the ground of the objection made at the time?

A. That the coffee was polished or colored.

Q. And you took it back?

A. Yes.

Q. What else was done?

A. Nothing to my recollection, sir.

Q. You have stated also, in answer to Mr. Kellogg's question that you had been in coloring mills; where was it?

A. I have been in them here, in Baltimore, and in Brazil, Rio.

Q. How many times in your business career?

A. I suppose, as applied to Brazil, I think two or three or four times.

Q. So it is within your knowledge there were such public institutions in Brazil?

A. I saw polishers there—yes, sir—polishing mills.

Q. Did they do anything more than polish?

A. Clear it, sir.

Q. Clear it?

A. Yes.

Q. Have you seen enough of those artificially colored coffees to be able to say whether or not these are artificially colored?

Mr. KELLOGG: I object to that.

The COURT: On the testimony you have given, on behalf of the defendant-, nobody could see it.

Re-cross examination by Mr. KELLOGG:

Q. Did you keep the coffee which you took back in this Nicholson transaction; have you got it yet?
A. No, sir.
Q. What did you do with it?
A. Sold it.
Q. Sold it to whom?
A. I cannot say, sir.
Q. In what manner?
A. On samples, sir.

By Mr. STICKNEY:

Q. When did you first get any knowledge as to that coffee being colored?
A. On the arrival of the coffee to the best of my recollection.

167 PLAINTIFFS' EXHIBIT Z FOR IDENTIFICATION.

Testimony of Theodor G. Lurman, from Stenographers' Minutes First Trial, Pages 117 *to* 158.

THEODOR G. LURMAN one of the defendants called as a witness, on his own behalf, being duly sworn, testified as follows:

Direct-examination by Mr. STICKNEY:

Q. Where do you live?
A. Baltimore county, Maryland.
Q. What is your firm?
A. Theodor G. Lurman & Co.
Q. Was that your firm name in the summer of '94?
A. Yes.
Q. Your firm it was then that had transactions with Crossman & Co., in litigation here?
A. It was.
Q. How long have you been engaged in the coffee trade?
A. Since about 1878, sooner than that—before that.
Q. How extensive have been your dealings?
A. I suppose at various time I have handle*d* about one hundred and fifty thousand bags a year and at times less than that.
Q. Do you remember this Catania shipment in controversy here?
A. I do.

Q. What date was it that you first saw samples of that coffee?

—. It was the date that I sent that telegram.

Q. In other words you sent your telegram the very day you saw the samples?

A. I suppose about two hours after the samples were tendered to me.

Q. How careful an examination of those samples did you make yourself?

A. I examined each chop most carefully; each mark or chop carefully.

168 Q. What did you find to be the condition of the coffee as to its being artifically colored or not?

Mr. KELLOGG: To that question I would like to make the same objection on the same grounds mentioned and also to all this line of testimony.

The COURT: Same ruling and exception.

A. I found the coffee in my mind——

The COURT: No, you found what?

A. I found the coffee colored?

—. ——.

A. Yes, sir, it was damp having the appearance of having been damaged; the coloring matter——

Q. No, not having the appearance; state what you observed.

By Mr. STICKNEY:

Q. Give everything that you noticed; everything that fell under your observation?

A. The coffee was colored, of spongy character; it was damp, damaged coffee and colored.

Q. Were you aware at the time of the quality of the samples or official standards or types of the Coffee Exchange in New York?

Mr. KELLOGG: I object to that.

The COURT: He may answer.

A. I was perfectly familiar with the standards.

Q. Do you know then whether or not they are artificially colored?

A. The standards are not artificially colored?

Q. You sent your telegram refusing to take the coffee on that ground?

A. Yes.

Q. Your partner has been examined here as to a former shipment of coffee that had some artificial colored coffee in it; do you remember that instance?

A. Perfectly.

Q. What was the shipment and when did this incident take place?

A. It happened probably about six months previous to this shipment received from Messrs. Crossman & Bro. It was brought

169 by a barkentine called the "Glad Tidings." We bought the coffee in Rio on types of the exchange as customary; the coffee

was sold by us "to arrive," not on samples, but on description. When the coffee arrived the buyer of the coffee refused to take it, and I immediately substituted other coffee for it, that is, not colored, and the coffee was resold on sample three-eighths below the market as colored coffee. The coffee was known by the trade everywhere as Lurman's yellows——

Mr. KELLOGG: I move to strike that out.

The COURT: Strike out what it was known as.

The WITNESS (continuing): But the shipper in Rio paid the difference.

Mr. KELLOGG: I move to strike that out.

The COURT: Strike it out.

Q. Am I right that you bought the coffee not by sample, but how?

A. Equal to New York Exchange standards.

Q. Did you buy it on your own account or on some one else's?

A. On my own account.

Q. Who was to receive the coffee; (meantime had you sold it to anybody else)?

A. As far as I can remember on our own account. I sold it to arrive and to be graded on New York Exchange standards, but as soon as the samples were tendered to the buyer on account of the coffee being artificially colored he objected to it and I immediately substituted other coffee.

Q. You made the contract good?

A. I made the contract good.

Q. At times you have dealt in artificially colored coffee?

A. I have.

Q. To what extent?

A. To a very limited extent.

Q. What has been your method and what has been the forms of your contracts in dealing in artificially colored coffees?

A. When I have furnished any artificially colored coffee it has been sold on sample.

170 Q. So the purchaser understood what he was getting?

A. He did.

Q. Are you able to state what this particular coloring matter was on this Catania coffee?

A. It was a yellow color but what it was I am not able to say.

Q. Have you any knowledge?

A. It was entirely apparent and it was very badly done.

Q. In this particular case did it increase or decrease the value of the coffee to your mind?

A. It was smeared on so thick that it was very apparent and there was no deception about it. The purpose was——

Mr. KELLOGG: I object.

The COURT: Strike out the purpose.

Q. In your business purposes what effect would it have in this particular case, to make the coffee more valuable or less valuable?
A. Less valuable.
Q. Take the particular coloring matter used in this case, in the case of this coffee. What effect does the use of that artificial coloring matter have as to concealing defects in the coffee?

Mr. KELLOGG: Objected to on the same ground already urged upon the examination of the other witness. The question does not relate to the particular coffee here in issue.

By the COURT: Have you ever seen coffee colored as were those samples before?
A. Yes, the coffee I received by the "Glad Tidings" so far as I could tell was colored in the same way.

The COURT: He may answer.
Exception by the plaintiff.

Q. (Question read.)
A. It conceals the defects.
Q. What effect does it ordinarily have upon the price or value of coffee?

Mr. KELLOGG: Objected to on the same ground.
Objection sustained. Exception by the defendant.

171 Q. What is the effect or result upon coffees ordinarily of the use of the artificial coloring matter that was used in this case?

Mr. KELLOGG: That is substantially the same question and I object to it.

By the COURT:

Q. Have you seen more than the two cases?
A. I have.
Q. Is this a common coloring matter?
A. It became an abuse.
Q. Was this a common coloring matter upon this coffee?
A. Yes.
Q. That was on the samples?
A. Yes.
Q. Put on in that way?
A. Yes, sir.

Objection sustained. Exception by the defendant.

By Mr. STICKNEY:

Q. What was the effect of this coloring matter upon this coffee as to concealing defects?

Mr. KELLOGG: Same objection.
The COURT: He may answer.
Exception by the plaintiff.

A. It concealed defects.
Q. As to concealing damage to the coffee, what effect did it have in that respect?

Mr. KELLOGG: To that I object on the same ground. This gentleman has not qualified as an expert.
Objection overruled. Exception.

A. It concealed damage, rain damage. It was rain damaged coffee.
Q. Rain damaged coffee?
A. Rain damaged coffee, artificially colored.
Q. The artificial coloring matter concealed it?
A. Yes.
Q. What would be if it was not concealed, the appearance of rain damage on the coffee bean?

Mr. KELLOGG: Objected to. He is not an expert.
The COURT: He may testify to his opinion.
Exception by the plaintiff.

A. It has a mouldy appearance and a musty smell.
172 Q. What effect would this coloring matter have upon that?
A. It would conceal that.

By the COURT:

Q. The question is did it conceal it?
A. It did conceal it.
By Mr. STICKNEY: Do you know as to the chemical nature of the chemical that was used on this particular coffee?
A. Nothing whatever.
Q. You have no personal knowledge?
A. No personal knowledge of the chemical.
Q. Do you know what the material is that was used?
A. I know nothing about the material.
Q. That is, you do not know the name of it?
A. No.
Q. Have you ever had any experience in these polishing and coloring mills?
A. No.
Q. What you know is hearsay?
A. Yes.
Q. But you know there is such a department in business?
A. I do.
Q. What is the charge that is made ordinarily for artificially coloring coffee?
A. It is from thirty to forty cents a bag.

Cross examination by Mr. KELLOGG:

Q. Mr. Lurman, you say this treatment of coffee concealed damage?
A. It did.

Q. And that that damage was what you called rain damaged?
A. Yes, sir.
Q. You sent that telegram saying the goods were unmerchantable, bad and below grade, within two hours after you got the sample?
A. I did about that time.
Q. How long did it take you to find out the coffee was bad?
A. At that time.
Q. What did you do, have an expert examination before you sent the telegram?
A. I consider that I am an expert in coffee.
Q. So you examined the coffee as soon as the samples
173 arrived?
A. We did, as soon as we were notified by the broker that he received the samples.

(Court adjourned to to-morrow morning.)

WEDNESDAY, *January 5th*, 1898.

Cross-examination of THEODOR G. LURMAN, resumed:

Mr. STICKNEY: I would like to ask one question.

By Mr. STICKNEY:

Q. Mr. Lurman, what instructions did you give to your arbitrator, Mr. Lee, in regard to the matter of making any objection to the grade of these coffees?
A. I instructed him to object to the coffee on the ground that it was undoubtedly colored and damaged and he could not appoint a grader, the coffee being damaged and colored.

Cross-examination by Mr. KELLOGG continued:

Q. When did you join the Coffee exchange?
A. In 1883, as far as I can recollect—early in 1883.
Q. Were you a member ever since that time until this controversy, at the time you were suspended?
A. Yes, sir.
Q. Did you at the time you joined sign a statement to support the by-laws and regulations of the exchange?
A. I imagine that I did, but I do not recollect that.
Q. There is no question about your having agreed to be bound by them?
A. I was living in Baltimore——

The COURT: Answer the question.

A. I dare say that I did sign them.

By Mr. KELLOGG:

Q. You know what are the by-laws, don't you, Mr. Lurman?
A. Yes, sir.

Q. You knew what the regulations and customs were at the time the controversy took place?

A. Yes, sir.

Q. You know the exchange favored arbitration?

174 The COURT: What difference does that make?

Mr. KELLOGG: I wish to show his knowledge of the regulations of the exchange and his agreement to be bound by them and what he subsequently did.

Q. (Question repeated.)

A. No, I do not know that.

Q. Did you know that the exchange had and always has had a body of licensed graders, so called?

A. I did.

Q. Who were appointed after passing an examination to qualify them as experts?

A. Yes, sir.

Q. And that matters in dispute between coffee merchants were decided by these graders?

A. Yes, sir.

Q. That is the graders appoint arbitrators between themselves if they cannot agree, and these arbitrators decide?

A. I do.

Q. You knew that the standards of the exchange did not permit the delivery of adulterated coffees?

A. I did.

Q. Illegal coffees?

A. I knew it had been delivered on exchange in spite of that.

Q. You had?

A. Yes, sir.

Q. With reference to polished coffees, Mr. Lurman, I wish you would state the extent of your firm's handling of polished coffees?

A. I very carefully considered that last night, as I expected the question. I talked that over with my former partner. There were periods probably five years before this controversy took place when I absolutely colored no coffee whatever; there were certain customers who wanted colored coffee, and in the competition of business I naturally sold colored coffees on sample; that was on sample, and the probable amount of coffee in the last fifteen years is perfectly insignificant—the amount of coffee I have sold; I do not think or do not place that as one quarter of one per cent. of my business; it was sold on sample and I never sent out a natural sample and

175 colored another sample to meet the natural sample or type. It was sold on actual sample to persons who wanted it.

Q. Now you are saying you have not colored coffees yourself; do you mean that you have not handled coffees which have been colored by others?

A. Yes sir.

Q. Do you mean you have not handled such coffees?

A. No, I mean I have handled coffees colored in Rio.

Q. Have you made an examination of books and records which enable you to state as a matter of figures the proportion of your business done in such coffees as that?

A. I cannot say I have examined it, but I carefully considered it.

The COURT: Answer the question.

A. No, I have not.

Q. With regard to such colored coffees, has your firm handled polished coffees during that period, prior to this controversy?

A. Yes, sir.

Q. To what extent?

A. To a very limited extent.

Q. In what trade?

A. In the southern trade.

Q. And southwestern trade?

A. Yes, sir.

Q. Not in the eastern or northern trade?

A. No.

Q. Do you know anything about the habits and methods of polishing coffees and coloring them?

A. I know very little.

Q. Do you know that foreign substances are used?

A. I do.

Q. What are those substances?

A. I know nothing about those substances.

Q. Do you know that charcoal and lampblack are used?

A. It is merely hearsay.

Q. Have you had coffees colored and polished with the use of such substances?

A. Yes, sir; I don't know whether those were the substances.

Q. Is there much doubt about it in your mind?

A. No, there is no doubt such substance has been used, but what substance I don't know.

176 Q. Soapstone is one of them?

A. Yes, I heard it was, but I don't know anything about it.

Q. Then you cannot tell by looking at a coffee whether it has been polished by the use of one substance or another?

A. I undoubtedly can tell it has been manipulated or colored.

Q. If you look at a sample or chop of coffee can you tell with what substance it has been treated?

A. Chemically no.

Q. Can you tell as a matter of common commercial knowledge such things as charcoal and lampblack, without any chemical analysis?

A. There is a difference between charcoal and lampblack; I could not tell whether it was charcoal or lampblack.

Q. You cannot tell just with what substance the coffee had been treated?

A. Not the identical substance.

Q. Have you received coffees which had been polished under con-

tracts calling for coffees of certain exchange grades in the course of your business career?

Mr. STICKNEY: Suppose this witness has seen fit to waive his legal rights in some transactions or contracts, what difference does it make.

The COURT: He may have some object in it, but I think it has gone to the limit, I think it has gone far enough. I think he testified to his business career pretty well; I would not go over it.

Mr. KELLOGG: I will limit it to two questions.

Q. (Question read.)
A. I received those coffees——
Q. Please answer yes or no?
A. Yes.
Q. Have you delivered such coffees under such circumstances?
A. No.
Q. You have had coffees polished and colored at different times you say; will you tell me what your object in doing that was?
A. To make the coffee more salable.
Q, What do you mean by that Mr. Lurman?
A. I mean it enhances the grade.
177 Q. What do you mean by enhances the grade?
A. Increases the value.
Q. Do you mean you have done it for the purpose of imparting a fictitious value to the coffee?
A. I mean to say the trade required it.

The COURT: Answer the question.

Q. (Question read.)
A. I should say it was a fictitious value.
Q. Did you do it for that purpose?
A. I did it to enhance the price.
Q. That is what you did it for?
A. Yes, sir.
Q. You did that through many years of your career?
A. I cannot say exactly how many years I did that.
Q. A long number of years or not?
A. No, I do not know as it was a long number of years, because for a long time I did not color coffees at all.
Q. For how many years?
A. Probably ten years.
Q. You received this Crossman sample on or about August 15th I believe, did you not?
A. I did, or rather Mr. Lawrence received them.
Q. Your firm.
A. They were sent to Lawrence, the broker who showed me the coffee.
Q. When did you see them first?
A. I saw them in August, whatever date it was; I think August 15th; I have a memorandum of it.

Q. What did you personally do then?
A. I examined them carefully.
Q. Immediately?
A. As soon as I was notified that the coffee or samples were there I examined them.
Q. Then you did what?
A. Examined them carefully.
Q. After you did that—after your examination what did you do?
A. I sent a telegram to W. H. Crossman & Brother.
Q. What did you discover on your examination?
A. I was perfectly convinced——

The COURT: What did you observe.

178 A. I observed and discovered that the coffee was artificially colored and rain damaged; I discovered that the coffee was wet and damp.
Q. Spongy?
A. It was more than spongy; it was damp.
Q. Was it spongy, so damp that it was spongy?
A. I could not say exactly.
Q. You used the word spongy yesterday: I am asking you about that particular word, was it spongy?
A. Yes, sir.
Q. Did it have a musty smell?
A. I do not recollect; I do not think I smelled it.
Q. You said yesterday it had a musty smell?
A. If I said so I must have smelled it; I suppose it did have a musty smell.
Q. Are you prepared to swear it did have one now?
A. Yes, sir.
Q. Why did you depart from the customs of the exchange and refuse to allow that coffee to be graded and rejected before any grading had been done or any grader appointed?
A. I considered it my duty to call Mr. Crossman's attention to the fact that he had tendered me unmerchantable coffee believing that he had done it inadvertently and that he would substitute sound and merchantable coffee for it.
Q. Why did you take the position in the telegram and letter that followed it that you rejected that coffee before any grading had been done?
A. Because it was the worst truck that I had ever seen.
Q. Why was it you were unwilling to leave that question to the graders if it was the worst truck you ever saw?
A. Because I thought it was between merchants and fair minded men who would substitute other coffee; I had a sample of coffee and I thought or took it for granted Mr. Crossman delivered me that coffee inadvertently and it was not his purpose to forward it
179 to me, and when his attention was called to it he would give me sound coffee for the artificially colored.

Q. When you sent that message Mr. Crossman answered saying that was a matter for the graders to decide, did he not?
A. He did.
Q. That being so, you then still refused to submit it to grading?
A. I did.
Q. Why did you refuse to submit it to grading after you knew Mr. Crossman took the position the graders ought to decide that question?
A. Because the coffee was so abominable that I wished the matter settled as to its being merchantable before they proceeded to grade it.
Q. Do you mean to say that the graders—these experts, were incapable of ascertaining the coffee's qualities?
A. There had been so much——
Q. Cannot you answer the question yes or no? (question repeated):
A. I think they were perfectly capable; I thought they were perfectly capable to do so.
Q. Do you mean to say you thought that they would not do so?
A. I feared that.
Q. You had not, then, appointed any grader?
A. No.
Q. You knew that an arbitrator would be appointed or selected by the two graders after you appointed one and Mr. Crossman appointed the other?
A. I do not understand.
Q. You knew that if an arbitrator was appointed it would be some person appointed by the two graders?
A. I did.
Q. Did you know who was going to be appointed arbitrator?
A. It was one of five names and Mr. Crossman——
Q. Do you mean to say that you knew or was certain that any five arbitrators that Mr. Crossman might name would swindle you?

Mr. STICKNEY: I object as entirely improper.
180 The COURT: You may leave out the word swindle.

Q. Strike out the word swindle, and substitute "would do you an injustice?"
A. Yes, sir.
Q. Had Mr. Crossman then named any people?
A. He had the selection of the five.
Q. Had he then named any?
A. He named Mackey & Small.
Q. Had he named any of the five people who were to arbitrate or were they selected?
A. Yes, sir.
Q. At that time?
A. It was in the contract.
Q. Had he named any such people at that time, whether he had a right to do so by the contract or not?
A. Yes, he had named five at that time.
Q. At what time; at the time you first rejected the coffee?

A. No, not the first day.

Q. Had he done it the second day?

A. I cannot tell whether the third day or fourth day or the exact day, but he had named five.

Q. Is it a fact that he did not name the five graders until August 29th, 1894, which was fourteen days after the coffee was received and rejected by you and is not that a copy of this letter in which he names the five (showing letter to witness of August 29th, 1894)?

A. That is the letter.

Q. So that was two weeks after the time you got the samples, fourteen days?

A. It was.

Q. Do you wish to have us understand that you were satisfied in advance that before Mr. Crossman named any graders that he would certainly name five from which the arbitrators should be selected, any one of whom would do you an injustice?

A. That is, I feared they would do me an injustice.

Q. That is the reason why you refused to submit to arbitration?

A. No, I wished the matter settled about this damaged or artificially colored coffee before they proceeded to grade it, as in
181 my judgment and positive opinion they could not grade coffee that was smeared over with an artificial substance.

Q. Please answer this question. Was it because you feared that anybody who Mr. Crossman would name would do you an injustice that you refused to arbitrate the coffee and rejected it in advance?

A. No.

Q. What was the cause of that then?

The COURT: He has answered no.

Q. Why was it you took this action, rejecting the coffee in advance of the grading if you did not fear injustice from the graders?

A. Because it was a colored coffee and it was the concensus——

Q. Never mind about the concensus?

A. It was the concensus of opinion in Baltimore, and the judgment of many others in New York that the coffee was artificially colored and damaged.

Q. And you were not willing to leave that question to the graders?

A. Not in advance of having decided about the colored coffee.

Q. What do you mean by that, Mr. Luhrman, not in advance of having it decided about the colored coffee?

A. Because I wished to have it definitely settled by the complaint committee.

Q. Of the exchange?

A. I filed the complaint against Mr. Crossman on the exchange.

Q. Do you know Mr. Lurman that graders in fixing the grade upon coffees are required to take into consideration the condition cleanliness and quality of the coffee?

A. I am not prepared to say what coffee graders do.

Q. Do you mean to say that you do not know what they do before you arrived at this decision?

A. I did not know what they would do.

Q. Did you not know the rules that govern their action?
A. No.
182 Q. Do you not know what constitutes a grade of coffee?
A. No. I knew what constituted a grade of coffee, yes.
Q. Didn't you know then what characteristics graders had to take into consideration in fixing the grade between you at that time?
A. I know what they ought to take.
Q. You knew what they ought to take and still you were afraid to allow them to take this matter into consideration?
A. I say I was afraid.
Q. That is for the reason you have already given and you have *no other reason, is that correct*?
A. No other reason.
Q. With reference to the arbitration; did you afterwards appoint an adjudicator for the purpose of having the question settled by the exchange as to whether or not you should appoint a grader of this coffee?
A. I did.
Q. And Mr. Crossman appointed another?
A. He did.
Q. And they appointed a third?
A. Yes, sir.
Q. Mr. Winter?
A. Mr. Winter.
Q. What did that gentleman decide?
A. He decided that I could not consider the quality and condition of the coffee.
Q. What did he decide about your duty to appoint a grader?
A. I appointed a grader under protest.
Q. What did he decide?

By Mr. STICKNEY:

Q. Is that decision in writing?
A. Yes, sir.

Mr. STICKNEY: The writing should be produced, I submit, or a copy of it.

By Mr. KELLOGG:

Q. After this adjudication you did appoint Mr. Sprague to act as your grader?
A. I did.
Q. And gave those instructions which you have testified to in answer to Mr. Stickney?
A. I told him in that letter that I was forced to appoint him.
183 Q. Did you give those instructions which you have testified to in answer to Mr. Stickney or not?
A. In that letter.

Q. Did you give those instructions which you have testified to in answer to Mr. Stickney or not a few moments ago?

A. I should like to know what question that was.

Q. The question as to your instructions to Mr. Sprague; don't you recollect you testified to that—or Mr. Lee?

A. I had no communication with Mr. Sprague except by letter.

Q. You did have communications with Mr. Sprague?

A. I wrote to him.

Q. And you did have communications with Mr. Lee about that time?

A. Yes, I did.

Q. And you gave him instructions which Mr. Stickney has asked you about?

A. I did, yes, sir.

Q. Did you sell coffee to the consumer direct?

A. Occasionally, very seldom.

Q. Usually, to whom?

A. Usually to brokers and dealers.

Q. Jobbers or retailers?

A. Wholesale dealers.

Q. With regard to the shipment by the "Glad Tidings," that you testified to yesterday, after that shipment was rejected by the person who agreed to purchase it from you, did you require the venders to take it back, the parties who had sold it to you?

A. I sold it for their account.

Q. Did you require them to take it back before selling for their account?

A. I represented the firm that sold it.

Q. Did you not testify yesterday that you bought it on your own account from them?

A. I did testify to that fact, but it has been four years ago; it was rather out of order; I now recollect that I sold it on that basis.

Q. So you did not buy it for your own account?

184 A. That invoice was not bought for my own account; it was sold four years ago and I cannot recollect it.

Q. So you were in error when you testified it was bought for your account?

A. Only to the extent it was for the account of a third party and not for my own account; I sold the coffee on New York Exchange chops.

Q. Was that before or after the rejection; what party are you speaking of?

A. That was the case of the "Glad Tidings."

Q. Was it before or after the rejection of the coffee by Mr. Nicholson; I think you said Mr. Nicholson rejected it?

A. Mr. Nicholson was the mill firm that shipped the colored coffee to me six or eight months before the question with Mr. Crossman was raised.

Q. I am talking about the "Glad Tidings"?

A. That coffee was colored coffee. It was discovered when it ar-

rived it was colored coffee. I made my contract good by substituting uncolored coffee for the account of the Rio firm.

Q. Why did you not request them to take back instead of selling it again on exchange, or to the trade, if it was of this description which you have spoken of?

A. Because I sold that coffee on sample.

Q. Would that protect the consumer whether you sold it on sample or not?

A. (No answer.)

Q. Did you sell it to consumers on sample?

A. I did not.

Q. If the coffee was bad coffee would not it hurt the consumer just as much if you sold it on sample as on contract?

A. Yes, sir.

Q. Now, what reasons did you have for rejecting colored coffee at this time, you having dealt in them previously?

A. On several occasions I shut down——

The COURT: Answer the question.

A. Because it had become a gross abuse and it was a mat-
185 ter of common scandal the amount of rain damaged that had been shipped from Rio. I came to the conclusion that I would have no longer anything to do with it. It was coffee—rain damaged coffee, shipped in considerable quantities to the United States to meet engagements or contracts that this coffee should be equal to New York exchange standard for natural and uncolored coffee. The coffee had been colored in Rio to meet the exchange standards, and I came to the conclusion that we would have nothing more to do with any colored coffees any more.

Q. That conclusion was reached just about that time or the first time?

A. No, it was not reached for the first time.

Q. Had you rejected other coffees on the same ground?

A. Yes, sir.

Q. With whom?

A. With the New York—some coffees William Rusk delivered on contract.

Q. Some shipment on the Catania?

A. I do not recollect the vessel, the vessel that arrived about that time.

Q. At the same time?

A. About that time.

Q. What was it in particular that made you reject this shipment?

A. The fact that it was abominable stuff.

Q. The fact that it was of high or low market value?

A. The market had nothing to do with it.

Q. I am talking about its value. You say the market had nothing to do with it?

A. Nothing whatever.

Q. What do you mean by saying it was miserable stuff unless the market had something to do with it?

A. I said abominable.

Q. What did you mean by that unless the market had something to do with it.

A. It was rain damaged coffee smeared with coloring matter.

Q. What did you mean by saying abominable stuff; do
186 you mean abominable to keep in your warehouse or abominable to sell in the market?

A. Abominable to sell in the market.

Q. The market did have something to do with it then?

A. None whatever.

Q. Although you bought it to sell in the market, that is your best answer to that question?

A. If it had been sound coffee I would be willing to take it and not ask Mr. Crossman to give me sound coffee in place of it.

By the COURT: What do you mean by sound coffee?

A. Undamaged, uncolored coffee; natural coffee.

By Mr. KELLOGG:

Q. What point was it about the coffee that awakened your objections especially?

A. The coloring matter on it.

Q. Why was it the coloring matter met with your objection?

A. Because it enhanced the grade.

Q. In what particular instance; you said it was abominable stuff; did that enhance the grade?

A. The coloring matter.

Q. Yes?

A. The coloring matter enhanced the grade.

Q. The coloring matter enhanced the grade of this coffee?

A. And concealed defects.

The COURT: Strike that out.

Q. The coloring matter in this case did enhance the grade of the coffee?

A. Yes.

Q. If the grade of the coffee was enhanced, it was worth more?

A. Yes.

Q. Therefore the coloring matter which was used on this particular occasion made it worth more did it?

A. Yes.

Q. Actually to you worth more?

A. No.

Q. Why not?

A. Because I would pay a high price for something that was not intrinsically worth what I was paying for it.

Q. Did the coloring matter in this particular coffee make
187 it worth more to you or not?

A. It concealed defects.

The COURT: Answer the question.

A. No, it did not.

Q. Did it enhance the value of that coffee to you whatever?
A. It did not enhance the value to me.
Q. Was it then because it made it appear to be abominable stuff, to use your language, that you objected to the coloring?
A. Please repeat that.
Q. Was it because the coloring matter made it appear to be abominable stuff that you rejected it?
A. The coloring matter and the rain damage—the damaged condition of the coffee.
Q. So the damaged condition of the coffee operated on your mind as well as the color?
A. It did.
Q. Why were you unwilling, if the damaged condition of the coffee was an objection, to submit that to the graders; were you afraid of injustice as to the rain damage which you have spoken of, on the part of the graders?

Mr. STICKNEY: There are two questions there.
The COURT: Yes, there are two questions in it.
Mr. KELLOGG: I will ask the latter part first.

Q. (Question read as follows:) Were you afraid of injustice as to the rain damage that you have spoken of on the part of the graders?
A. Yes.
Q. Do you know and did you know that the question of damage by rain or otherwise was a point that graders must consider in grading coffee?
A. No, I did not know that.
Q. You did not know that?
A. No, they ought to do it but I did not know that they would do it. I did not think that they would do it.
Q. If the coffee had not been colored was the extent of the rain damage you spoke of such that you would have rejected it entirely?
A. It was impossible to form a decision as to what the coffee was because it was so smeared over with coloring matter.
188 Q. You could not see that it was rain damaged?
A. You could tell it was rain damaged by the damaged condition of the coffee; I could not form a correct opinion of the coffee owing to this coloring matter that was put on the surface of it.
Q. How did you detect the rain damage in the examination of coffees?
A. By the feel of it, if damp, if the beans are swollen, also a musty condition of the coffee, or you can tell it by the eye, the gen-ral appearance and also by feeling of the coffee.
Q. If you closed your eyes, or an expert we will say, grasped a handful of the coffee or coffee beans, can he tell by the grasp of the hand whether it is rain damaged coffee?
A. I never graded coffee with my eyes shut.
Q. Can it be done?

A. I am not prepared to say.

Q. Under the present circumstances how did you ascertain it was rain damaged?

A. By the feel, smell and general appearance to the eye.

Q. You detected it partly by feeling and partly by smell?

A. And by the general appearance of the coffee.

Q. Do you mean to say that the salt of the substance which was on the coffee concealed the feeling of it?

A. Yes, to a certain extent.

Q. Did it conceal the feeling entirely?

A. Not entirely.

Q. And could you tell by feeling the coffee that was submitted to you that it possessed that rain damaged feeling?

A. (No answer.)

Q. Could you tell by feeling that coffee in those samples that it possessed that rain damaged feeling.

A. I did not leave it to the feelings.

Q. Answer the question. Did you tell at that time by feeling of the coffee as it was present?

A. Partly, partly.

Q. Do you mean in the second place to have us understand
189 that the coloring of this coffee had concealed its smell?

A. No.

Q. You do not?

A. No, not entirely.

Q. Did you smell it?

A. Yes.

Q. Do you mean us to understand that the treatment which this coffee has sustained concealed its appearance to the eye as rain damaged coffee?

A. Largely, yes, sir.

Q. What do you mean by largely?

A. To a great extent.

Q. Entirely?

A. No, then it would be complete deception; it was not complete deception, because I could tell it was rain damaged, to what extent I am not able to tell.

Q. That you told yourself within two hours after receiving the first samples, before the telegram was sent?

A. Yes, and was confirmed in that opinion by many others.

Q. When did you first see that New York statute about adulterations, Mr. Lurman?

A. After this question of W. H. Crossman & Co. took place.

Q. How long after?

A. I am not exactly prepared to say whether immediately after this or before; there was some coffee delivered to firms in Baltimore—colored coffee—and there was a great deal of talk in Baltimore about this colored coffee that was being delivered. There was a meeting held in Baltimore and I was appointed to go and see the United States attorney; he looked up the statutes and informed us

that as far as he could tell in Baltimore, that the New York statutes was against the law to deal in that coffee; that was about this time; I think it may have been after this—after the 15th of August, but my impression is it was a few days before.

Q. Can you fix that day with accuracy in any way?

A. I could by finding the letter from William Marbury.

Q. Have you got that letter?

190 A. Mr. Davidson has that opinion; I submitted that opinion to the adjudicators of the New York exchange.

By Mr. STICKNEY:

Q. The New York Coffee Exchange?

A. New York Coffee Exchange; I submitted that to them with all the written testimony and the analysis of it to the adjudictator; then I was told to appoint a grader; they would not consider the question of the colored coffee.

By Mr. KELLOGG:

Q. Glance at this letter I show you and see whether it refreshes your recollection as to the date when you heard of the New York statute?

A. That must have been the date.

Q. What is that date?

A. That is August 28th.

Q. That is thirteen days after you received the Crossman samples?

A. My impression is I saw him personally. I think that must be the second letter; I am not certain but I saw him personally; I had that letter on the day the adjudicators met, whatever day that was; I know I had that letter.

Q. Had this letter?

A. Yes, sir.

Q. So the meeting of the adjudicators was after this time?

A. I am not perfectly sure.

Q. It must have been if you had this letter?

A. I should like to be refreshed as to when the adjudication occurred; it has been four years since, and I am not sure about dates.

Mr. DAVIDSON: It was the 30th.

Q. The meeting was between June 28th and the 30th then?

A. Yes, sir.

Q. Then you had this letter when you saw the adjudicators?

A. Yes.

Q. When did you first claim the existence of rain damaged in this office?

A. I claim it in my telegram to Crossman & Co.

Q. Is this the language you referred to "As being colored and damaged and far below grade purchased?"

A. That was the language that I used.

191 By the COURT:

Q. That does not answer it; strike out that answer. Is that the language you referred to in that telegram?

A. Yes, sir.

By Mr. KELLOGG:

Q. Is there any place in the correspondence between yourself and Mr. Crossman or Mr. Crossman's firm in which you point out to him that the coffee is rain damaged?

A. As far as I can recollect I did not say *rain damaged*, but damaged, damaged I did say as far as I can recollect; I used damaged, but may not have said rain damaged.

Q. Did you before the adjudicators or any of the tribunals of the exchange urge the point that the coffee was rain damaged as you say?

A. I am not prepared to say what the adjudicators did; I cannot say that I used the word rain damaged, although I think that I did; I am not perfectly sure that I used the word rain; throughout the controversy I claim that the coffee was damaged.

Q. Was not your claim before the exchange based upon the ground that the coffee was colored and did you base your claim upon the ground that the coffee was rain damaged?

A. I based my claim upon the claim that the coffee was artificially colored.

Q. That was the point that was argued and urged before the exchange and its various committees and tribunals?

A. Everything was in writing; I am not prepared to say; I did not claim the coffee was damaged.

Q. Can you point out to me any place in any documents or any proceedings before the exchange tribunals in which you base your claim upon the ground the coffee is rain damaged?

A. I should like to refer you to my letter to the adjudicators, the statement of it.

Q. Will you look at this and see if that is a copy of the letter (showing letter)?

192 A. This was the letter; as far as I see there was nothing about damage in the letter.

Q. Nothing about damage?

A. As far as I can see, I did not read it all through.

Q. Won't you read it all through; won't you see if there is anything about damage or rain damage in that letter, and if so, point it out to me?

A. No, there is nothing I can see about damaged coffee here.

Q. Your partner was asked with reference to why you determined about this time to discontinue handling colored coffees; he said it was because you thought it was deception, is that correct?

A. Yes, that is correct.

Q. Will you tell me, if you please, why it occurred to you at that time it was deception and had not occurred to you during the ten years previous which you have testified to?

A. It had occurred to me during the ten years previous, but I had sold coffee on sample because in the competition of business certain dealers required and wanted it; when they wanted it we did sell the coffee on sample, and sold it as colored coffee. They knew perfectly well that the coffee was colored. When we determined to stop entirely and to shut right down on this thing, it was because it had reached—it became a gross abuse; damaged coffee had been shipped to a considerable extent from Rio to fulfill contracts on natural types; I came to the conclusion I would have nothing more whatever to do *with it; there were chops submitted to me from Rio;* immediately I cabled back when the "Glad Tidings" coffee arrived.

Q. I did not ask you about that. If you had thought before that this was deception upon the consumer, why did not you discontinue it before?

A. I had discontinued it at times.

Q. Why did you take it up again if so?

A. Because customers demanded it.

Q. Did the consumer demand it of you?

A. No.

193 Q. Then it was deception to the consumer in one case, it was just as much deception in another irrespective of what the consumer wanted?

A. I sold it to the wholesale dealer.

Q. But you knew it was going into consumption?

A. I did.

Q. You know if it was deception to the consumer in one case it would be just as much deception in another whatever your own customer might have demanded from you?

A. I realized that and shut down on the whole thing.

Q. After having done it for ten years?

A. Not ten years.

Q. How long?

A. There were periods when I did not sell any colored coffee at all.

Q. Then you took it up again?

A. When they demanded it.

Q. Who demanded it?

A. Customers.

Q. Not the consumer?

A. No.

194 Supreme Court, New York County.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Bro., Plaintiffs-Respondents,
against
THEODOR LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Co., Defendants-Appellants.
} Waiver of Certification, &c.

Pursuant to section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing are correct and true copies of the judgment roll, case and exceptions and notice of appeal in this action on file in the office of the clerk of this county, and of the whole thereof. And it is further stipulated that certification of all the foregoing is waived and the case be settled and ordered on file.

Dated New York, October 11th, 1900.

DILL, SEYMOUR & KELLOGG,
Attorneys for Plaintiffs-Appellants.
CHARLES STEWART DAVISON,
Attorney for Defendants-Respondents.

The within case settled and ordered on file.

MILES BEACH, *J. S. C.*

195 *Order of Affirmance by Appellate Division.*

At a term of the appellate division of the supreme court, held in and for the first judicial department at the court house in the county of New York, on the 25th day of January, 1901.

Present: Hon. Charles H. Van Brunt, presiding justice, Hon. William Rumsey, Hon. Edward Patterson, Hon. Morgan J. O'Brien, Hon. Chester B. McLaughlin, justices.

GEORGE W. CROSSMAN ET AL., Plaintiffs-Appellants,
against
THEODOR G. LURMAN ET AL., Defendants-Respondents.

The appeal of the plaintiffs, George W. Crossman, *et al.*, from the judgment entered in this action on the 31st day of May, 1900, in the office of the clerk of the county of New York, in favor of the defendants and against the plaintiffs, and from the order denying the motion for a new trial entered in said county clerk's office on the same day, in the above entitled action, coming on to be h-ard, and after hearing Frederick R. Kellogg, Esq., of counsel for the plaintiffs-appellants, and Charles Stewart Davison, Esq., of counsel for the defendants-respondents in opposition thereto and due deliberation having been had;

Now, on motion of Charles Stewart Davison, attorney for defendants and respondents, it is unanimously

Ordered that the said judgment and order be, and the same hereby are, affirmed with costs to the defendants-respondents.

196 *Certificate by Clerk of Appellate Division.*

Appellate Division of the Supreme Court, First Judicial Department, Clerk's Office, New York County.

GEORGE W. CROSSMAN ET AL.
v.
THEO. G. LURMAN ET AL.

I, Alfred Wagstaff, clerk of the appellate division of the supreme court, in the first judicial department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above entitled action or proceeding, and entered in my office on the 2nd day of February, 1901, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of New York this 2nd day of February, 1901.

[SEAL.] ALFRED WAGSTAFF, *Clerk.*

197 *Judgment Affirming Judgment.*

Supreme Court, New York County.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Plaintiffs,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Defendants.
} Judgment.

The plaintiffs having appealed from the judgment entered herein on the 31st day of May, 1900, in favor of the defendants, Theodor G. Lurman and Benjamin D. Williams, and for the sum of eight hundred twenty-six and 19 / 100 dollars ($826.19) and from the order denying the motion for a new trial entered in the above entitled action on the same day, to the appellate division of the supreme court for the first judicial department; and said appeal having been argued, and said appellate division having unanimously affirmed said judgment and order with costs of said appeal to said defendants-respondents, and said costs having been duly taxed by the clerk of this court; now on motion of Charles Stewart Davison, Esq., attorney for the defendants-respondents, it is

Ordered and adjudged that said judgment and order be and the same hereby are affirmed with one hundred and twenty-eight

55/100 dollars ($128.55) costs and disbursements to the defendants-respondents against the plaintiffs-appellants, and that the said defendants-respondents have execution therefor.

Dated New York, February 13th, 1901.

WM. SOHMER, *Clerk.*

198 *Notice of Appeal.*

Supreme Court of the State of New York, County of New York.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Bro., Plaintiffs-Appellants,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Co., Defendants-Respondents.

Take notice that the plaintiffs-appellants above named hereby appeal to the court of appeals from the order of the appellate division of the supreme court in the first district entered in the above entitled action on the second day of February, 1901, and the judgment entered thereon on the 13th day of February, 1901, affirming with $128.55 costs the judgment entered upon a verdict herein on the 31st day of May, 1900, and an order denying a motion for a new trial entered upon the same day in the office of the clerk of this court and from each and every part of said order and judgment.

Dated New York, March 14, 1901.

DILL, BOMEISLER & BALDWIN,
Attorneys for Plaintiffs-Appellants, 27 Pine Street, Borough of Manhattan, New York City.

199 To Charles Stewart Davison, Esq., attorney for defendants-respondents, 56 Wall street, New York city. William Sohmer, Esq., clerk of county of New York. Alfred Wagstaff, Esq., clerk of the appellate division in the first department.

Certificate of County Clerk.

STATE OF NEW YORK, *County of New York,* } ss:

I, William Sohmer, clerk of the said county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original certified copy appellate division order, judgment and notice of appeal in George W. Crossman, *et al., vs.* Theodor G. Lurman, *et al.*, on file in my office, and that the same are correct transcripts therefrom and the whole of such originals.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 29 day of March, 1901.

[SEAL.] WM. SOHMER, *Clerk.*

200 *Opinion.*

Supreme Court, Appellate Division, First Department, January, 1901.

Charles H. Van Brunt, P. J.
William Rumsey,
Edward Patterson,
Morgan J. O'Brien,
Chester B. McLaughlin, J. J.

GEORGE W. CROSSMAN ET AL., Appellants,
vs.
THEODOR G. LURMAN ET AL., Respondents. } No. 2760.

Appeal from judgment entered upon verdict, and from order denying new trial.

Mr. Frederick R. Kellogg, for appellants.
Mr. Charles Stewart Davison, for respondents.

RUMSEY, *J.:*

This action was brought to recover damages because of the refusal of the defendants to accept certain coffee which the plaintiffs agreed to sell to them. The coffee was tendered to the defendants and was refused because it did not comply with the contract, which was to sell 500 bags of sound Rio coffee in grade about standard eight and nine of the Coffee exchange. The contract contained a provision for grading and arbitration in case of a dispute, as to which it is only necessary to say that there was a dispute and that an arbitration was had, and the arbitrators decided that the coffee was of the grade which the contract called for. The defendants still refused to accept it upon the ground that it was colored in such
201 a way as to be adulterated within the provisions of section 41 of the public health law of the State of New York, and that for that reason they were not bound to take it. The case has been tried three times and has been in this court twice before. Upon the first appeal, which is reported in 33 App. Div. 422, it was held that the defendants, to justify their refusal to accept this coffee because it was adulterated within the provisions of the public health law were bound to show not only that it was artificially colored, but that the effect of the coloring was to conceal damage or make the coffee appear better than it really was or of greater value. No different rule was established when the case was before this court for the second time (46 App. Div. 63), but the judgment from which that appeal was taken was reversed because of the erroneous admission of evidence. Upon the trial now under review it was conceded that the coffee was artificially colored, and the only question as to which there was a dispute was whether the artificial coloring concealed damage or made the coffee appear better than it really was or of greater value, and that was the question submitted by the court to

the jury. The evidence was sufficient to warrant the conclusion which the jury reached, and the only matters for us to decide are whether any of the exceptions taken by the plaintiffs and which are here relied upon are well founded. Those exceptions, so far as it is necessary to examine them separately, are as follows:

It is claimed that the court erred in denying a motion to direct a verdict for the plaintiffs upon the ground that the question of adulteration was settled in their favor by the arbitration which had taken place under the contract. That question is not open for discussion in this court. It was determined by the general term (90 Hun. 303; affirmed, 149 N. Y. 588), which conclusion was adopted by this court, upon the former appeal (33 App. Div. 422).

But it is claimed that so far as the sale in the original pack-
202 ages of articles imported into this State is effected by the public health law referred to, that statute is beyond the power of the legislature to enact. The argument is that the sole power to regulate commerce is given to Congress; that with respect to the adulteration of food products, Congress has exercised that power by chap. 839 of the Laws of 1890; that the power being exclusive, the action of Congress overrides the law of any State passed upon the same subject, and therefore that the State law has become inoperative. If the public health law was intended to be or could be construed to operate as a regulation of commerce, there could be no doubt that any action of Congress on that subject would be exclusive and would override the State statute. But the fact that Congress has the power to regulate commerce does not exclude the exercise of the police powers of the State so far as it may prohibit the bringing into the State of anything which from its nature may not properly be said to belong to commerce, or because its condition is such that it is detrimental to the health of the people of the State. The rule as to the power of the State is laid down in the opinion of Mr. Justice Catron in the License Cases (5 How. 504–599) and that rule, although it was not adopted by the court in that case, has been approved in subsequent decisions of the Supreme Court of the United States, and may safely be adopted as showing the power of the States in that regard. (Bowman *v.* C. & N. R'y Co., 125 U. S. 465–489; R. R. Co. *v.* Husen, 95 U. S. 465.) In each case, whether the result of the adulteration is such as to authorize the legislature to prohibit its sale is a question to be decided with respect to the particular article.

That brings us to an examination of the exceptions taken to the rulings of the court with respect to the admission of evidence. It must not be forgotten that the question for the jury has been brought by the rulings of the court and by the facts admitted on the trial within a very narrow compass. The claim of the defendants
203 is that this coffee had been adulterated within the provisions of the public health law (General Laws chap. 25 sec. 41; Heydecker's General Laws p. 2000). It was not denied that the coffee was colored with some coloring substance, and the question was whether the presence of that coloring substance on the coffee con-

cealed damage or made the coffee appear better than it really was or of greater value. There was no other question for the jury than that, and the testimony which was presented, on the trial raised a dispute only so far as it bore upon that question. The burden of proof of that fact was upon the defendants.

That the coffee was colored was conceded. The defendants proved it by one of the plaintiffs, called as a witness for the defendants; and the plaintiffs proved it by one of the defendants, called as a witness for them; so that neither party was in a situation to dispute that fact. The defendants having given evidence tending to show that the coffee was colored, and that the effect of it was to conceal damage and make the coffee appear better and of greater value than it really was, the plaintiffs put upon the stand Lurman, one of the defendants, who gave such testimony as he was called upon to give by them. Lurman answered frankly all the questions he was asked. It appeared from his testimony that he had examined the coffee, that he found it nicely colored with a powder, that he saw a lot of painted coffee, that it was low grade coffee, containing black, withered, sour and swollen beans, that it was impossible to tell the brown beans from the black beans because of the coloring matter upon them, and if it had been uncolored it would have been a low grade coffee, and the effect of the coloring matter was to conceal imperfections in the grains. He gave other testimony as to which there seems to have been no particular dispute. After Mr. Lurman had been sworn, one Lee was called as a witness. He was not, so far as appears, at all interested in the matter and was attending the trial at the request of the defendants, although he had not been sworn by
204 them. With regard to the testimony of Lurman and Lee, the court was requested to charge "that the plaintiffs having called Mr. Lurman and Mr. Lee as their witnesses, the jury are not at liberty to disregard these witnesses, but these witnesses must be considered to be credible witnesses." This charge was given and to it the plaintiffs excepted; but it is to be noticed that the exception of the plaintiffs did not adopt the precise words used by the court in its charge, but the exception read, "are not at liberty to *discredit* these witnesses, but these witnesses must be considered as credible witnesses;" the word "discredit" being used instead of the word "disregard" which was used in the charge. When it is considered that these witnesses were put upon the stand by the plaintiffs to establish facts which they deemed material in the case, and that so far as appears they testified frankly as to the facts which the plaintiffs sought to prove by them, it is difficult to see how the plaintiffs were aggrieved by the charge of which they complain. One who puts a witness upon the stand does so to prove his case, and asks such questions as he deems necessary to establish the facts he seeks to prove, and he cannot be injured if the jury see fit to believe that the witness is telling the truth with respect to the facts elicited from him.

The charge as given was certainly correct. These witnesses were sworn by the plaintiffs, and out of their mouths the plaintiffs elicited certain facts. It goes almost without saying that the jury were not

at liberty to disregard the testimony of those witnesses. They may not have been called upon to credit all that they said; but they were bound to regard it and consider it to the extent at least of coming to a conclusion whether they would adopt it as to the facts sworn to by those witnesses. Clearly, they were not at liberty to disregard it, and the court in charging as it did was correct. It is equally clear that they were bound to regard the witnesses as worthy of credit.

205 Lee was the plaintiffs' own witness, and was in no sense adverse so far as appears. It is well settled that where one puts a witness upon the stand he presents him as a credible witness, and he is not at liberty to say that he is not credible (Pollock *v.* Pollock 71 N. Y. 137–152; Thompson *v.* Blanchard 4 N. Y. 303–311; Becker *v.* Koch 104 N. Y. 394). The same applied to Lurman when the plaintiffs saw fit to use him as their witness. (Becker *v.* Koch *supra.*)

The court charged the jury that it was for them to say whether upon the proof given the full extent of the damage was, after the beans had been colored, just as apparent to the ordinary untrained observer as it would have been had the coffee not been colored. I can see no ground for any exception to this charge. It was precisely the question in the case which the jury were bound to pass upon, and it was properly submitted to them.

It is said that the court erred in charging that there were damaged beans in the coffee. As every witness testified to that fact, the objection is not well taken. Even the plaintiff Crossman testified that he found damaged beans and he picked out some which were there. We have examined the other exceptions taken to the refusals to charge and we find no error in them.

Neither were there any erroneous rulings with respect to the admission of evidence which can be said to operate to the damage of the plaintiff. We think it necessary to refer to but one class of the evidence which was excluded. That is to the stenographer's minutes of the testimony given by Lurman and Williams on a former trial. Of course, whatever was said by them in that testimony were declarations of the two defendants and were competent so far as they were material upon the issue which was presented to the jury in this case. Williams was not sworn as a witness, and therefore his declarations upon the former trial were only material if they bore upon some fact which was litigated upon this trial. The only such fact

206 was whether the coloring of the coffee operated to conceal damage or make the coffee appear better than it really was or of greater value. After a careful reading of the testimony of Williams, which was offered in evidence, but which was excluded and is printed as an appendix to the case, we are unable to find that there is anything in it which bears upon the question litigated before the jury. The only thing as to which he testified with regard to the condition of the coffee was that it was artificially colored. Had that been a disputed question of fact, the exclusion of his evidence upon that point would be something of which the plaintiffs might complain but as it was admitted that the coffee was colored,

this declaration is not of the slightest importance. The remainder of the minutes consisted of matter bearing upon his motive in defending the action, being an attempt to show that he did so because of a decline in the price of colored coffees and that he was himself a dealer in them. In view of the fact that he was not a witness on the trial and his credibility was not in question, his motives were of no importance and his declarations were properly excluded.

The same thing may be said substantially with regard to the testimony of Lurman. It is quite true that Lurman was a witness on this trial, and it is claimed that some of the evidence given on the former trial tended to contradict some of the things he testified to on the trial under review; but no contradiction can be found in those minutes of any fact which was material to the issues which were presented in this case.

For these reasons, therefore, the ruling of the court as to these minutes was correct. It is quite possible that testimony might tend to discredit Lurman by showing that he was induced to refuse the coffee and defend this action because there was a fall in the price of colored coffees, as a result of which he ceased to deal in them; but the plaintiffs having put him upon the stand, his declarations were not competent to be used by them to contradict him, and they were not material because the question was not what were the
207 motives of Lurman, but whether when he had received the coffee he had acted within his rights.

Upon the whole case, after careful examination, we cannot see that there was any error, and the judgment must be affirmed with costs.

All concur.

Opinion Rendered on First Appeal.

Supreme Court, Appellate Division, First Department, October, 1898.

Charles H. Van Brunt, P. J.
William Rumsey.
George C. Barrett.
Edward Patterson.
Morgan J. O'Brien, J. J.

GEORGE W. CROSSMAN ET AL., Respondents, *against* THEODORE G. LURMAN, ET AL., Appellants. } Reported in 33 App. Div., 422.

Appeal from judgment entered upon verdict of a jury.

Charles Stewart Davison, for appellants.
Frederick R. Kellogg, for respondents.

"RUMSEY, *J.*:

On the 17th day of July, 1894, the firm of which the plaintiffs are members sold to the defendants, who are partners in business in

Baltimore, in the State of Maryland, 500 bags of coffee, to arrive in New York from Rio de Janeiro by the steamship Catania.
208 By the terms of the contract half of the coffee was to be of a grade equal in average to about standard No. 8, and the other half to be about equal in average to standard No. 9 of the Coffee Exchange of the City of New York. The manner in which the coffee was to be graded was prescribed in the contract, and it was further provided that if the grading by the selected graders should be unsatisfactory, the matter of grading should be submitted to other persons, to be selected in the manner prescribed by contract. The coffee arrived in New York as expected, and it was tendered by the seller to the buyer. The defendants claimed that about half of the coffee which was claimed to be in-grade No. 9 was artificially colored, and was, therefore, not salable coffee within the provisions of the public health law of the State of New York, and because of this fact they required that graders should be selected under those terms of the contract which provided for another grading in case that made by the selected graders was not satisfactory. The new grading was had and the arbitrator selected under the contract concluded that although the coffee was artificially colored, yet that it practically complied with that provision of the contract which required that it should be about the standard grade No. 9. That conclusion having been reached by him, the plaintiffs tendered the coffee to the defendants, who expressed a willingness to accept so much of it as was uncolored, but refused to accept the colored coffee for the reason which they had before given. Upon that refusal, the plaintiffs caused the coffee to be sold at auction, and they bring this action to recover the difference between the price of the coffee, pursuant to the bargain, and the amount received at the sale. The defence is that the coffee had been colored in such a way as to appear better than it really was and of greater value, in contravention of section 41 of the public health law, which forbids the selling or offering for sale of any food adulterated in that way. It will thus be seen that, upon the trial, the issue between the par-
209 ties was whether the coffee objected to was in fact adulterated within the provisions of the statute in such a way that it could not be legally sold within the State; because if it was, there can be no doubt that the defendants were justified in refusing to accept it, and that the plaintiffs cannot compel its acceptance nor recover damages for the refusal of the defendants to take it. Upon the trial this issue was presented to the jury, who found a verdict in favor of the plaintiffs for the amount of their damages. A motion was afterwards made for a new trial, which was denied, and judgment having been entered upon the verdict, this appeal is taken from the judgment and the order denying the new trial.

At the trial the plaintiffs objected, in the first place, to any examination of the question whether the coffee was in fact adulterated. Their claim was that as the contract provided for a regrading by arbitrators to be selected by the parties in case the original grading was unsatisfactory, and as it appeared that this regrading was had

and the arbitrators had graded the coffee in accordance with the contention of the plaintiffs, the award necessarily operated as a final determination by a selected tribunal that the coffee complied in all respects with the requirements of the contract. It was urged that such an award necessarily involved the proposition that the coffee was not adulterated, because if it was adulterated it could not comply with the terms of the contract. It is unnecessary to examine into the weight to be given to this contention. The same question was presented in another form to the general term of the supreme court in the matter of Lurman (90 Hun., 303), and in that case it was concluded that although the coffee was up to the grade, yet if it was adulterated it could not be made the subject of lawful delivery and upon a suit brought to recover damages for a refusal to accept it, the adulteration would have been a good defence. That question was legitimately within the purview of the court in deciding
210 that case, and it must be accepted as a conclusive adjudication upon that subject, and for that reason it is not necessary to further examine this question. It may be said that the determination of the general term in that case was affirmed by the court of appeals upon the opinion of the general term. (149 N. Y. 588.)

The question is thus presented whether the coffee was in fact adulterated, within the definition of the statute of the State. The statute is found in section 41 of the public health law, being chapter 661 of the Laws of 1893. It provides that "no person shall within the State * * * sell or offer for sale, any adulterated food or drug." The statute then goes on to say that "an article shall be deemed to be adulterated within the meaning of this act * * * if it be colored * * * whereby damage is concealed, or it is made to appear better than it really is, or of greater value." It is plain that under the provisions of this statute the mere fact that an article is colored is not of itself sufficient to make the sale of it illegal. The sale of a colored article is not forbidden unless by means of the coloring damage to the article is concealed, or the article is made to appear better than it really is, or of greater value. The intent with which the coloring is put upon the article is of no importance. The law deals solely with the effect, and it forbids the sale of the colored article only when, after the coloring shall have been put upon it, one of the effects mentioned in the law shall have been produced. Unless that has taken place the sale of the article is not illegal. In this case it was not disputed that the coffee had been artificially colored, and that fact was admitted upon the trial; but whether that artificial coloring had either concealed damage or made the article appear better than it really was, or of greater value, was the question contested upon the trial, and that was the question presented to the jury. Upon that question a considerable number of witnesses were sworn, both by the defendants and plaintiffs. It was accepted as the serious
211 question in the case and the one upon which the jury were finally to determine, and, as had been said, it was the question which was finally submitted to the jury by the learned trial

judge. The defendants were permitted to offer evidence of persons who had examined this coffee and were able to testify to its appearance and condition, and to say whether, in their judgment, the coloring matter upon it had the effect to make the coffee appear better than it really was, or of greater value; and several of them testified that in their judgment such was the effect produced by the application of the color. The defendants also produced another witness, who was a dealer in coffee and had considerable familiarity with the article and with the manner of dealing with it, and with the effect produced by coloring matter applied to coffees. He had examined certain colored coffee, but was unable to say whether the coffee examined by him was that tendered to the defendants by the plaintiffs. The defendants sought to show by this witness that the effect of artificial coloring of coffee, especially where the coloring matter used was a ferric salt of a yellow color, as was the case here, would be to enhance its value, or make it appear better than it really was. The effort to prove these facts by the witness was made in a variety of ways by several questions, each one of which was objected to by the plaintiffs upon the ground that the question was immaterial and irrelevant and the evidence was incompetent. These objections were sustained and exceptions were taken, and this ruling of the court presents, as we think, an exceedingly serious question. It was assumed to be, and it undoubtedly was essential for the defendants in establishing their case to show that the use of coloring matter upon the coffee in question was to enhance its value or make it appear better than it really was. That was conceded and such evidence as applied to the particular coffee was admitted in every case where it was offered. The witness whose testimony was objected to
212 and rejected was a man of considerable experience in that trade, who had dealt largely in coffee, and was familiar not only with the manner of dealing, but with the effect of coloring matter generally upon coffee to which it was applied, and it must be assumed that he was able to say what in such cases was the general effect of the application of coloring matter to the article.

It must be assumed that no one would attempt to change the color of coffee with a view to make it appear worse, or to diminish its value, or to add to it anything which actually decreased its usefulness, but that whenever anything of that kind was done, the act had for its object, either actually to make the coffee better, or to make it appear better or of greater value. It needs no argument to establish the fact that such a change in the appearance of the coffee would have no other object, but as we have said, the intention with which the coffee was colored is not material within the purview of the statute. The statute looks not at the intention, but only at the effect which has been produced. It appears, and is uncontradicted in the case, that the coloring of coffee was not an unusual thing, but, on the contrary, that colored coffees were very largely imported into the United States and very largely dealt in for purposes of sale in certain portions of this country. The coloring of coffee, therefore, was quite

familiar to dealers, and it must be assumed, as was stated, that the object of it was to improve it, either in actual value or appearance, and not to make it appear worse. That being so, it was clearly within the province of a dealer in coffee who was familiar with colored coffees to say whether the addition of a yellow coloring substance to the coffee bean would produce the intended effect and enhance its value. For that reason this testimony should have been admitted, and the witness should have been permitted to say what was the usual effect of such a coloring of coffee as this, and the ruling was erroneous and the exception was properly taken.

213 But it may be said that the defendants had been allowed to give testimony as to the effect of this coloring matter upon this coffee. That is very true, but where the question is one of fact as is the case here, and where that question of fact is the serious and only question in the case, a party should be permitted to give all the testimony that he has upon the litigated question. It will not do to say that it did no harm to the defeated party to exclude certain evidence which he offers upon a hotly litigated question of fact, because other testimony was admitted in his behalf upon the same question. He may very well say that if he had been permitted to give the excluded testimony, the jury would have found with him and not against him; and for that reason, where the case turns upon a disputed question of fact, and competent evidence bearing upon that question offered by the defeated party has been excluded, it is impossible to say that injury was not done to him. For this error this judgment and order must be reversed. There are many other exceptions in the case which it is unnecessary to consider as they may not arise upon the subsequent trial; but for the error alluded to the judgment and order must be reversed and a new trial ordered, with costs to the appellant to abide the event."

Opinion Rendered on Second Appeal.

Supreme Court, Appellate Division, First Department, November, 1899.

Charles H. Van Brunt, P. J.
George C. Barrett.
William Rumsey.
George L. Ingraham,
Chester B. McLaughlin, J.J.

214 GEORGE W. CROSSMAN ET AL., Appellants, *vs.* THEODOR G. LURMAN ET AL., Respondents. } Reported in 46 App. Div., 63.

Appeal from judgment entered upon verdict of jury.

Mr. Frederick R. Kellogg for appellants.
Mr. Charles Stewart Davison for respondents.

INGRAHAM, *J.:*

On a former appeal to this court in this action (33 App. Div. 422) it was held that the only question presented was whether a sale of the coffee was prohibited by section 41 of the public health law (chap. 661 of the Laws of 1893). It is there provided that "No person shall within the State * * * sell, or offer for sale, any adulterated food or drug. An article shall be deemed to be adulterated within the meaning of this act * * * in the case of food * * * If it be colored, or coated, or polished, or powdered, whereby damage is concealed or it is made to appear better than it really is, or of greater value." As was said on the former appeal "it is plain that under the provisions of this statute the mere fact that an article is colored is not of itself sufficient to make the sale of it illegal. The sale of a colored article is not forbidden unless by means of the coloring, damage to the article is concealed, or the article is made to appear better than it really is, or of greater value. The intent with which the coloring is put upon the article is of no importance. The law deals solely with the effect, and it forbids the sale of the colored article only when, after the coloring shall have been put upon it, one of the effects mentioned in the law shall have been produced. Unless that has taken place the sale of the article is not illegal." It was also thus held that a ruling of the court ex-
215 cluding testimony of a witness called for by the defendant as to whether the effect of the artificial coloring of the coffee would be to enhance its value, or make it appear better than it really was, was error and upon that ground the judgment was reversed and a new trial ordered. In discussing this particular evidence the court says: "It was assured to be, and it undoubtedly was essential for

the defendants in establishing their case to show that the use of coloring matter upon the coffee in question was to enhance its value or make it appear better than it really was. That was conceded, and such evidence as applied to the particular coffee was admitted in every case where it was offered. The witness whose testimony was objected to and rejected was a man of considerable experience in that trade, who had dealt largely in coffee, and was familiar not only with the manner of dealing, but with the effect of coloring matter generally upon coffee to which it was applied, and it must be assumed that he was able to say what in such cases was the general effect of the application of coloring matter to the article * * * It appears, and is uncontradicted in the case, that the coloring of coffee was not an unusual thing, but on the contrary, that colored coffees were very largely imported into the United States and very largely dealt in for purposes of sale in certain portions of this country. The coloring of coffee, therefore, was quite familiar to dealers and it must be assumed, as was stated, that the object of it was to improve it, either in actual value or appearance, and not to make it worse. That being so, it was clearly within the province of a dealer in coffee who was familiar with colored coffee to say whether the addition of a yellow coloring substance to the coffee bean would produce the intended effect and enhance its value. For that reason this testimony should have been admitted, and the witness should have been permitted to say what was the usual effect of such a coloring of coffee as this." Upon the trial, the parties entered into a
216 stipulation admitting the sale of the coffee, its tender to the defendant, its grading as provided for in the contract from which it appeared that the coffee was a good delivery under the contract, that "the presence, in greater or less quantity, in coffee of small sticks, black beans, hulls, broken beans, musty beans, little stones, dirt, rain damaged beans, pale beans, swelled beans, sour beans, are all taken into consideration in grading coffees, and the coffees which are to be graded and classified by the graders by comparison with the said standards or standard samples of the exchange which under the rules of the exchange serve as the only guide. This classification or grading takes into account the presence of all such (and any other) defects in greater or less quantity, but is irrespective of the color or style of the coffee. This reference to color or style, however, does not in any wise mean artificial color, but merely that coffee is not to be graded any higher or any lower, because in natural color it is a light coffee or a dark coffee; equally good coffees come forward to this port from different ports or plantations, some light, some dark, sometimes most of the coffees in a given year being light and at other times dark. In other words, difference in the natural color of coffee is not regarded as an element entering into grading." Upon this stipulation and proof of the contract and the refusal to accept by defendant, the plaintiffs rested. The defendant called a witness who testified that he was an analytical chemist; that he subjected some of the coffee in controversy to a chemical analysis; that upon the coffee he found a foreign substance which

was a form of iron, presumably oxide of iron; that this substance was over the whole of the bean, so far as the witness could tell; that this oxide of iron is a dense, opaque substance and this substance covered the whole of the beans evenly. Upon cross-examination the witness testified that some of this substance appeared to adhere to the surface of the bean and none appeared to be loose. There was no evidence that this oxide of iron in the quantities it was
217 found upon these beans was in any way deleterious to health, or that this particular coffee was damaged, or that as a fact, this coloring matter found upon the coffee beans concealed any damage. The defendants having rested, the plaintiff called several witnesses to rebut the inference sought to be drawn from the testimony that this coffee covered to a greater or less extent with this opaque substance did as a fact conceal damage, and endeavored by these witnesses to show as a fact the condition of the coffee that they examined. Small, a coffee dealer, and one of the licensed graders of the Coffee exchange since its inception in 1882, and who passed upon this coffee in dispute under the contract, was asked a number of questions tending to show the effect that this coloring matter produced upon the appearance of the coffee and whether the coloring substance did prevent the witness from ascertaining the condition of the coffee.

All of these questions were excluded upon objection by the defendants. Another witness was called who was a jobber and importer of coffee. He had been in business for twenty years and during that entire time he had been familiar with coffees that had been artificially colored. He had examined the coffee in question and was asked whether the substance that was found upon these coffee beans was opaque or translucent; and was then asked a series of questions as to the effect that this coloring matter had upon this coffee, and what he saw upon an examination of it. He was asked whether he could see the character of the bean, and see any defect thereon notwithstanding the yellowish substance upon the bean, which questions were excluded upon the objections of the defendants.

Several other witnesses were called and asked similar questions all of which seem to have been excluded, upon objections by the defendants.

It is a little difficult to see upon what principle these rulings were made. The question is whether the coffee had been so col-
218 ored, or coated, or polished, as to conceal damage, or whether it was made to appear better than it really was or of greater value. The defendants had been allowed to prove that there was a coating of an opaque substance upon the coffee, and had rested at that. The plaintiffs in rebuttal endeavored to prove that the coating of this substance upon the coffee bean did not as a matter of fact conceal any defects in the coffee, but were not permitted to do so.

The witness was not asked to testify to an opinion, but to what he as a fact saw in examining the coffee. Even assuming that the

witness's opinion upon that subject was not competent, it certainly was competent for him to examine the coffee and to testify to the appearance of the bean with the coating upon it which had been testified to by the defendants' witnesses. This court upon the former appeal distinctly held that expert testimony as to the condition of the coffee was competent. The judgment rendered upon the first trial was reversed by this court upon the ground that such evidence had been excluded. It was true that on the former trial the evidence which was excluded was offered by the defendants but the ruling that that expert testimony was competent on behalf of the defendants was not a ground for excluding expert testimony offered on the part of the plaintiffs to rebut that offer by the defendants. As was said upon the former appeal, "the coloring of coffee, therefore, was quite familiar to dealers, and it must be assumed as was stated, that the object of it was to improve it, either in actual value or appearance, and not to make it worse. That being so, it was clearly within the *the* province of a dealer in coffee who was familiar with colored coffees to say whether the addition of a yellow coloring substance to the coffee bean would produce the intended effect and enhance its value.

For that reason this testimony should have been admitted, and the witness should have been permitted to say what was the usual effect of such a coloring of coffee as this." We think, therefore, that
219 under the rule laid down in the former appeal the exclusion of this evidence was error. The effect of our former decision was that a sale of coffee under this section of the public health law before cited was not illegal unless it appeared that the article so offered for sale was colored or coated so that damage as a fact was concealed or that it was made to appear better than it really was or of greater value. The statute prohibits an individual from selling his property, in derogation of the common law right of every one who owns property. It is a statute that is not to be extended beyond what can be fairly inferred from its terms, and the mere fact that an article of food has upon it a coloring or coating which would tend to conceal damage, if such damage existed, is not within the prohibition of the statute. It must appear not only that such a covering was placed upon the article, but that such a covering or coating did conceal damage. The language of the statute is "if it be colored or coated or polished or powdered whereby damage is concealed," not such a covering or coating as *would* conceal damage, if damage existed but such a covering or coating as in the case of a particular article exposed for sale did conceal damage. This was the construction of the statute which was given upon the former appeal. To justify a person in refusing to accept the delivery of an article as prohibited by this statute there must be some proof that it was a damaged article, and that such damage was concealed by the covering or coating. In this case it was expressly stipulated that the color of the coffee was not an indication of its value and that therefore a discoloration of a bean would not of itself be damage. It is difficult to see, therefore, how evidence merely tending to show that

this coffee was colored by a substance which was in its nature opaque, without proving that the coffee itself was in some way damaged which this covering did conceal, would bring the case within the statute.

220 The learned trial court seems to have submitted to the jury a question as to what was intended by the contract, and as to whether or not these plaintiffs were bound to deliver to the defendants "natural coffee;" and the court stated to the jury that he supposed that "natural coffee" meant coffee which is in the state in which it was grown without any addition to it of any sort, adding further: "The claim is made here that under that contract the plaintiffs, before they can recover, must prove that the coffee that they offered to deliver and did tender to the defendants in this case was "natural coffee." And it is for you to determine what "natural coffee" meant. It is a question of fact under this contract." To this charge of the court the plaintiff excepted. Turning to the contract it does not appear that anything was said about "natural coffee." What the plaintiffs sold and what the defendants bought was five hundred pound bags of Rio coffee, such coffee to average in grade about standards numbers eight and nine of the Coffee Exchange of the City of New York. It was conceded that grade nine is the lowest of the standard grades of the New York Coffee Exchange, and it certainly could not be assumed that this grade of coffee was of particular excellence or that the defendants were bound to deliver anything more than they agreed to deliver, namely, five hundred bags of Rio coffee.

The parties to the contract had provided a means of ascertaining whether or not coffee tendered under this contract was of the grade required by it, and under the provisions of the contract the grade of the coffee tendered was ascertained, and it was determined that it was of the grade required by the contract. Thus, the defendants were precluded from alleging that the coffee tendered was not a good delivery under the contract. The defendants' sole defense to this demand on the part of the plaintiffs, as was clearly stated by this court upon the former appeal, was that any sale of this coffee within this State was a violation of the provisions of the public health

221 law before referred to. The sole issue of fact to be disposed of upon the trial therefore, was whether or not a sale of this coffee was prohibited by this provision of the public health law, and that depended entirely upon whether or not the defendants were able to prove that this coffee was colored or coated or polished or powdered, whereby damage was concealed or it was made to appear better than it really was, or of greater value.

Upon that question, even assuming that the defendants had proved facts sufficient to justify a submission of the question to the jury, the evidence before referred to offered by the plaintiffs in rebuttal was clearly competent.

For the reasons above indicated I think the judgment should be reversed and a new trial ordered, with costs to the appellants to abide the event.

All concur.

222 At a special term, part 2, of the supreme court, held in and for the county of New York at the county court house in the borough of Manhattan of the city of New York on the 2nd day of June, 1902.

Present: Hon. John Proctor Clarke, justice.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Co., Plaintiffs,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Co., Defendants.

This cause having been brought on upon the remittitur herein sent down from the court of appeals, and now filed in this court, by which remittitur it appears that an appeal was taken by the plaintiffs from the judgment of the appellate division of this court to the said court of appeals, and that such judgment has been affirmed by said court with costs, and that the record and proceedings had been directed by said court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals according to law; now, therefore, on motion of Charles Stewart Davison, Esq., of counsel for the defendants, it is

Ordered and adjudged that the judgment of the said court of appeals be, and the same hereby is, made the judgment of this
223 court, and that the defendants have execution against the plaintiff- for the costs when adjusted by the clerk and inserted in the judgment to be entered hereon, as well as for $826.19 adjudged to be recovered in and by the judgment of the trial term of this court in this cause, entered the 31st day of May, 1900, as affirmed with $125.55 costs by the judgment entered herein on the 13th day of February, 1901, and that this order or judgment be annexed to the judgment roll.

Enter.

J. P. C., *J. S. C.*

[Endorsed:] Supreme court New York county. George W. Crossman, & ano. against Theodor G. Lurman, & ano. Order in remittitur. Chs. Stewart Davison, attorney for defendants, 56 Wall street, New York city. Filed June 2, 1902.

224 Supreme Court, New York County.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Co., Plaintiffs,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Co., Defendants.
} Judgment.

A judgment in this action, in favor of the defendants against the plaintiffs, having been rendered in this court on the 31st day of May,

1900, upon the verdict of a jury, and the costs of the said defendants having been duly adjusted by the clerk of this court at the sum of $826.19; and the plaintiffs having appealed from the said judgment to the appellate division of this court for the first department; and the said judgment having been unanimously affirmed with costs, and the said costs having been adjusted by the clerk of this court at the sum of $125.55 and the said amount inserted in the judgment of affirmance entered herein on the 13th day of February, 1901; and the plaintiffs having appealed therefrom to the court of appeals and the said court of appeals having sent to this court a remittitur filed the 2nd day of June, 1902, by which it appears that the said court of appeals has affirmed the said judgment of February 13th, 1901, in all things, with costs, and has given judgment accordingly, and has remitted the judgment of the said court of appeals to this court, to be enforced according to law; and this court having
225 by an order entered herein on the 2nd day of June, 1902, ordered that said judgment be made the judgment of this court; now, on motion of Charles Stewart Davison, Esq., defendants' attorney, it is

Ordered and adjudged that the judgment of the said court of appeals be, and the same hereby is, made the judgment of this court, and that the defendants have execution against the plaintiffs for the costs on the said last mentioned appeal, amounting to $169.97 as adjusted by the clerk of this court, as well as for the amounts of the before mentioned judgments.

Dated June 4th 1902.

[SEAL.] THOS. L. HAMILTON, *Clerk.*

[Endorsed:] Supreme court, New York county. Geo. W. Crossman & ano. against Theodor G. Lurman & ano. Judgment. Filed June 4, 1902. 10 h. 55 m.

226 Supreme Court, New York County.

GEORGE W. CROSSMAN & ANO., Plaintiffs, *against* THEODOR G. LURMAN & ANO., Defendants. } Costs of Defendants on Appeal to the Court of Appeals.

Costs.		Disbursements.	
Costs before notice of trial	$	Referee's fees	$
" after " "		Commissioner's fees	
Additional defendants served		Clerk's fees	
Trial fee, issue of fact		" " on entering judgment	50
" issue of law		Paid for searches	
Allowance by statute		Affidavits and acknowledgments	12
" " court		Serving copy summons and complaint	
Motion		Paid referee's report	
Trial occupied more than two days		Certified copies orders	
Procuring injunction order		Satisfaction piece	
Appointment of guardian of infant defendant		Transcript and filing	
Examination of party before trial		Certified copy judgment	50
Attending and taking deposition *de bene esse*		Postage	
Drawing interrogatories to annex to commission		Jury fees	
Making and serving case		Stenographer's fees	
" " amendments case		Sheriff's fees on execution	
Making and serving case of more than 50 folios		" " attachment	
Term fees	10 00	" term fees	
Motion for new trial, special term		Extract from minutes	
Proceedings before and after granting new trial		Paid printing cases	
Applic'n for judg't on spec'l ver't before argum't		" " points	66 65
Applic'n for judg't on spec'l ver't for argum't		" copies following papers	
Appeal to appellate division before argument		" filing return to court of appeals	
Appeal to appellate division for argument		Remittitur	2 20
Appeal to court of appeals before argument	30 00		
Appeal to court of appeals for argument	60 00		
Preparing case on appeal to court of appeals			
Damages in court of appeals for delay		Attendance of following witnesses:	
Interest on verdict			
Disbursements	69 97		
Total	169 97		$69 97

I hereby certify that I have adjusted this bill of costs at $169.97.
Jun- 4, 1902.

THOS. L. HAMILTON, *Clerk.*

COUNTY OF NEW YORK, ss:

George W. Phillips, Jr., managing clerk for the attorney for the defendants in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made or ineurred in this action and are reasonable in amount; and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

GEO. W. PHILLIPS, JR.
J. J. G.

Sworn to before me, this 2nd day of June 1902.
ROBERT MARTIN,
Notary Public, New York County.

227 [Endorsed:] N. Y. supreme court. George W. Crossman & ano. against Theodor G. Lurman & ano. Costs and notice of taxation. Take notice, that the within is a copy of the items of the costs and disbursements in the within action, and that the same will be adjusted by the clerk of the supreme court of the county of New York at his office, in the court house in the city of New York on the 4th day of June 1902 at 11 o'clock in the forenoon of that day, and the amount inserted in the judgment roll. Yours, &c., Chas. Stewart Davison attorney for defendants, 56 Wall street. To Dill, Bomeisler & Baldwin attorneys for plaintiffs 27 Pine street. June 2, 1902.

We consent to this bill of costs being taxed at $169.97 at any time.
DILL, BOMEISLER & BALDWIN,
Attorneys for Plaintiffs.

June 3d 1902.

228 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the supreme court of the State of New York, first judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George W. Crossman and Herman Sielcken, composing the firm of W. H. Crossman & Brother, plaintiffs, and Theodor G. Lurman and Benjamin D. Williams, composing the firm of Theodor G. Lurman & Company, defendants, wherein was drawn in question the validity of a statute of the State of New York, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of the validity of said statute, a manifest error hath happened, to the great damage of the said George W. Crossman and Herman Sielcken, as by their

complaint appears; we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday *day* of October 1902, that the record and proceedings aforesaid being inspected, the said
229 justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of August, in the year of our Lord one thousand nine hundred and two.

(S'g'd) JOHN A. SHIELDS,
Clerk U. S. Circuit Court, Southern District of N. Y.

The foregoing writ is hereby allowed.

R. W. PECKHAM,
Jus. Sup. Ct., U. S.

July 24, 1902.

230 [Endorsed:] Supreme Court of the United States. George W. Crossman, *et al.*, plaintiffs in error, against Theodor G. Lurman, *et al.*, defendants in error. Copy writ of error. Dill & Baldwin, attorneys for pl'ffs in error, 27 Pine street, New York city.

231 Supreme Court of the United States.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Brother, Plaintiffs in Error,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Company, Defendants in Error.

Know all men by these presents: That we, George W. Crossman of the city of New York, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto Theodor G. Lurman and Benjamin D. Williams, composing the firm of Theodor G. Lurman & Company, defendants in error above named, in the sum of two thousand dollars ($2,000.00) to be paid to the said Theodor G. Lurman and Benjamin D. Williams, their executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the 21st day of July, 1902.

232 Whereas the above named plaintiffs, George W. Crossman and Herman Sielcken, composing the firm of W. H. Crossman & Brother, have sued out a writ of error to the United States Supreme Court to reverse the judgment in the above entitled cause by the supreme court of the State of New York for the first judicial department:

Now, therefore, the condition of this obligation is such that if the above named plaintiffs, George W. Crossman and Herman Sielcken, composing the firm of W. H. Crossman & Brother, shall prosecute said writ to effect, and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

GEORGE W. CROSSMAN. [SEAL.]
AMERICAN SURETY COMPANY
[SEAL.] OF NEW YORK.
DAVID B. SICKELS, *Vice President.*
CORTLANDT S. VAN RENNSELAER,
Attorney.

STATE OF NEW YORK, }
County of New York, } *ss:*

On this 22d day of July, 1902, before me personally came George W. Crossman, to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged that he executed the same.

THORLEY MILLER,
[SEAL.] *Notary Public, Kings Co.*

Ctf. filed in N. Y. Co.

233 STATE AND COUNTY OF NEW YORK, *ss:*

On this 22nd day of July 1902, before me personally appeared David B. Sickels vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rennselaer and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rennselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rennselaer and was thereto subscribed by the like order of the said board

of directors, and in the presence of him the said David B. Sickels vice president.

[SEAL.] K. J. PEIRCEY,
Notary Public, Kings Co., # 5.

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland and Nassau counties.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"*Resolved*, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rennselaer attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 22d day of July, 1902.

[SEAL.] CORTLANDT S. VAN RENNSELAER,
Attorney.

234 STATE OF NEW YORK, } *ss:*
County of New York, }

Cortlandt S. Van Rennselaer being duly sworn says: That he is an attorney of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company, and is duly qualified to act as surety under such laws. That said company has also duly complied with and is duly qualified to act as surety under the act of Congress of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said company as rendered pursuant to section 4 of said act of Congress; that said American Surety Company of New York

is worth more than $2,500,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

CORTLANDT S. VAN RENNSELAER.

Subscribed and sworn before me this 22 day of July, 1902.

K. J. PERCEY,

[SEAL.] *Notary Public #5, Kings Co.*

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland and Nassau counties.

J. J. G.

235 [Endorsed:] United States Supreme Court. George W. Crossman and ano., pl'ffs in error, against Theodor G. Lurman and ano., def'ts in error. Copy. Approved July 24, 1902. R. W. Peckham, jus. Sup. Ct. U. S. Indemnity bond. Dill & Baldwin, attorneys for pl'ffs in error, 27 Pine street, New York city.

236 All which we have caused by these presents to be exemplified, and the seal of our said supreme court to be hereunto affixed.

Witness, Hon. Alfred Steckler, a justice of the supreme court for the county of New York, the twelfth day of August in the year of our Lord one thousand nine hundred and two, of our Independence the one hundred and twenty-seventh.

[New York Seal.]

THOS. L. HAMILTON, *Clerk.*

—, Alfred Steckler, a presiding justice at a special term of the supreme court of the State of New York for the county of New York, do hereby certify that Thos. L. Hamilton, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York, and clerk of said supreme court for said county duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated, New York, Aug. 12th 1902.

ALFRED STECKLER,

Justice of the Supreme Court of the State of New York.

STATE OF NEW YORK, }
City and County of New York, } ss.:

I, Thos. L. Hamilton, clerk of the supreme court of said State in and for the county of New York, do hereby certify that Hon. Alfred Steckler whose name is subscribed to the preceding certificate, is presiding justice at a special term of the supreme court of said State in and for the county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, this 12th day of Aug. 1902.

[New York Seal.]

THOS. L. HAMILTON, *Clerk.*

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CROSSMAN
v.
LURMAN.

MAY, 1902.

Vol. 171.

Opinion of the Court, per Haight, J.

Charles Stewart Davison for respondents. Section 41 of the public health law, relating to adulteration of food, does not violate the interstate commerce clause of the Federal Constitution. (*Plumley v. Massachusetts,* 155 U. S. 461.)

HAIGHT, *J.:*

This action was brought to recover the damages sustained by the plaintiffs by reason of the refusal of the defendants to accept certain coffees tendered to them under an executory contract dated July 7, 1894.

The contract, so far as is material upon the question which we shall discuss, is as follows: "Sold for account of Messrs. W. H. Crossman & Bro. to Messrs. Theo. G. Lurman & Co., Baltimore, Md., about 250 No. 8, 250 No. 9. Five hundred (500) bags Rio coffee (sound and made sound portion), to be shipped at Rio de Janiero by st'r Catania." The contract contains other provisions with reference to grading, under the rules of the Coffee Exchange of New York, the price to be paid and for determining the grade by arbitrators if a difference arises with reference thereto between the parties. When the coffee arrived it was tendered to the defendants and the number eight was accepted, but that graded as number nine was rejected as colored and damaged and far below the grade purchased, and the plaintiffs were asked to substitute other coffee. This coffee was subsequently sold by the plaintiffs on account of the defendants for a less sum than the contract price, and this action was brought to recover the difference. The defendants interposed the defense that the coffee was adulterated, colored, coated, polished and powdered, whereby damage was concealed and the coffee made to appear better than it really was, and of greater value, in contravention of the provisions of chapter 661 of the Laws of 1893 of New York. Upon the issue raised the case was tried before a jury, and upon such trial the sole question submitted to the jury was as to whether the coffee in question was colored, coated or powdered, whereby the damage was concealed, or it was made to appear better than it really was or of greater value. The verdict was in favor of the defendants,

238 and the judgment entered thereon was unanimously affirmed by the appellate division.

It is now contended on behalf of the plaintiffs that the statute alluded to is in contravention of the commerce clause of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign countries and among the several States of the Union.

The statute in question, so far as material, provides as follows: Section 41. "Adulterations.—No person shall within the State, manufacture, produce, compound, brew, distill, have, sell, or offer for sale any adulterated food or drug. An article shall be deemed to be adulterated within the meaning of this act * * * in case of food * * * 6. If it be colored, or coated, or polished, or powdered whereby damage is concealed or it is made to appear better than it really is or of greater value." By the law of Congress of 1890 (ch. 839) it was provided (sec. 2): "That it shall be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spirituous or malt liquors, adulterated or mixed with any poisonous or noxious chemicals, drug or other ingredient injurious to health." And then follow provisions adjudging offenders guilty of a misdemeanor and providing for their punishment. It may be that this law was only intended to prohibit importations of food or drugs which had been adulterated with articles which were injurious to public health, but it contains no provision authorizing the importation of articles which are adulterated for the purpose of deceiving and defrauding purchasers and consumers. We think, therefore, it cannot be held to be in conflict with the statute of this State.

The States have no power to regulate commerce with foreign countries or with each other. This power has been delegated to the Congress of the United States, and that body can, by law, determine what shall or shall not be permitted to be imported. With the right of importation follows the right of sale in original packages,
and, therefore, the States cannot prohibit the sale of articles
239 of commerce within their borders. The States cannot, under the guise of inspection, or under their reserved police powers, prohibit the importation into their jurisdictions of sound meat, under the pretense that it may be damaged or decayed, or Texan cattle for fear they may be diseased, or spirituous or malt liquors for fear that they may intoxicate, or oleomargarine for fear it may be adulterated (*R. R. Co. v. Huson*, 95 U. S., 465; *Bowman v. Chi. & N. W. R'y Co.*, 125 U. S., 465; *Leisy v. Harden*, 135 U. S., 100; *Schollenberger v. Penn.*, 171 U. S., 1.) But to this power delegated to Congress there exist certain exceptions. The articles of commerce must be merchantable and of the character represented. The States, under the police powers reserved to them, may inspect and reject that which would be injurious to the public health or public morals and that which was designed to cheat or defraud the people. They may, consequently, inspect meats and exclude such as has become damaged and unwholesome. They may inspect Texan cattle and exclude those that are in fact diseased. They may inspect spirituous or malt liquors and exclude such as are adulterated with poisonous or noxious

chemicals injurious to public health, and they may inspect oleomargarine and exclude that which is colored in imitation of yellow butter and represented to be such.

In the case of *Bowman v. Chi. & N. W. R'y Co.* (*supra*) Mr. Justice Matthews, in delivering the opinion of the court, says: "Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes
240 of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered regulations of commerce prohibited by the Constitution."

In *Railroad Co. v. Huson* (*supra*) it was held that while a State cannot, beyond what is absolutely necessary in self-protection, interfere with the transportation into or through its territory of articles of commerce, it may enact sanitary laws and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations and prevent persons and animals having contagious or infectious diseases from entering its territory. Mr. Justice Strong, in delivering the opinion of the court, says: "We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the State. We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. As was said in *Thorp v. R. & B. R. R. Co.* (27 Vt. 149) 'it extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State.' * * * Under it a State may legislate to prevent the spread of crime or pauperism or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases. * * * The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State, for example animals having contagious or infectious diseases."

In the case of *Powell v. Penn.* (127 U. S. 678) Mr. Justice Harlan, in considering the statute of Pennsylvania prohibiting the sale of oleomargarine as imitation butter, says: "It is scarcely necessary to say that if this statute is a legitimate exercise of the police
241 power of the State for the protection of the health of the people and *for the prevention* of fraud, it is not inconsistent

with that amendment," referring to the Constitution of the United States.

In the case of *Schollenberger v. Penn.* (*supra*) Mr. Justice Peckham, in holding that the statute of Pennsylvania was unconstitutional in absolutely prohibiting the manufacture and sale of oleomargarine, says: "In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of *preventing fraud or deception* in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State."

In the case of *Plumley v. Mass.* (155 U. S. 461) it was held that a statute of that State to prevent deception in the manufacture and sale of imitation butter, in its application to the sales of oleomargarine artificially colored so as to cause it to look like yellow butter and brought into Massachussetts, is not in conflict with the clause of the Constitution of the United States investing Congress with the power to regulate commerce among the several States. Mr. Justice Harlan in delivering the opinion of the court in that case, says: "The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?" He then proceeds to show by a consideration of the cases that the Constitution of the United States does not prohibit
242 the States from enacting laws to prevent fraud and deception in the sale of articles of commerce.

It appears to us that this case cannot, in principle, be distinguished from the action we have before us for determination and that it settles the question as to the validity of our statute. The right of a State, under the police powers reserved, to enact laws to prevent fraud and deception in the sale of articles of food, as well as to preserve the public health, is not only conceded by these authorities but expressly held to exist. The coffee tendered by the plaintiffs, which was rejected, was of a low grade, containing many poor, withered and black beans. It, confessedly, was colored and the beans coated with a yellowish substance. It is not contended that the coloring matter improved the taste or added to the value of the coffee. It is claimed that the only purpose of the coloring was to hide the character of the poor beans and to make them appear of the same character as the good coffee. The jury has found by its verdict that it was so colored as to conceal the damaged portions or made it to appear better than it really was, or of greater value to the

ordinary untrained observer. In other words, that it was adulterated for the purposes of fraud and deception. This, we think, the legislature had the right to prevent.

We have considered the other questions discussed upon the argument of this appeal, but have reached the conclusion that there were no errors committed which were prejudicial to the appellants, or of sufficient importance to require a new trial.

The judgment should be affirmed, with costs.

Parker, Ch. J., Bartlett, Martin, Vann, Cullen and Werner, JJ., concur.

Judgment affirmed.

243 STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, W. H. Shankland, clerk of the court of appeals of said State of New York, do hereby certify that the foregoing copy of the opinion in the case of George W. Crossman, *et al.*, appellants, against Theodore G. Lurman, *et al.*, respondents, has been duly compared with the original on file in the office of the reporter of the court of appeals, and that the same is a true and correct transcript therefrom, and of the whole of said original on file as aforesaid.

In witness whereof, I have hereunto set my hand and the official seal of the court, at the city of Albany, this 12th day of June, A. D., 1902.

[Seal State of New York Court of Appeals.]

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

244 Supreme Court of the United States.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Brother, Plaintiffs in Error,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Company, Defendants in Error.

George W. Crossman and Herman Sielcken, the plaintiffs in error, by Dill & Baldwin, their attorneys, having this 24th day of July, 1902, presented to this court their petition for the allowance of a writ of error, intended to be urged by said plaintiffs in error; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises:

On consideration whereof the court does hereby allow a writ of error, upon the plaintiffs in error giving a bond according to law, in the sum of two thousand dollars, which shall operate as a supersedeas.

Dated 24th day of July, 1902.

R. W. PECKHAM,
Justice of Sup. Ct. U. S.

245 Supreme Court of the United States.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Composing the Firm of W. H. Crossman & Brother, Plaintiffs in Error,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Company, Defendants in Error.

And now come George W. Crossman and Herman Sielcken, plaintiffs in error, and say that on the 4th day of June, 1902, the clerk of the supreme court of the State of New York for the county of New York, first judicial department of that State, entered judgment herein obedient to a decision of the court of appeals of said State, affirming a former judgment of like effect, which was entered in said county of New York on the 31st day of May, 1900, said cause having been appealed to the court of appeals aforesaid, in which judgment and the proceedings confirming same and those had prior thereto in this cause certain errors were committed to the prejudice of these plaintiffs in error, George W. Crossman and Herman Sielcken, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these plaintiffs, George W. Crossman and Herman Sielcken, pray that a writ of error may issue in this behalf to the honorable judges of the supreme court of the State of New York for the first judicial department of said State for the correction of errors so complained of, and a transcript of the record, proceedings,
246 and papers in this cause may be sent to the Supreme Court of the United States.

Dated New York, July 17, 1902.

DILL & BALDWIN,
Attorneys for Plaintiffs in Error,
27 Pine Street, New York City.

247 Supreme Court of the United States, of the October Term, in the Year of our Lord One Thousand Nine Hundred and Two.

GEORGE W. CROSSMAN and HENRY SIELCKEN, Composing the Firm of W. H. Crossman & Brother, Plaintiffs in Error,
against
THEODOR G. LURMAN and BENJAMIN D. WILLIAMS, Composing the Firm of Theodor G. Lurman & Company, Defendants in Error.

Afterwards, to wit, on the 17th day of July, 1902, in the same term before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said George W. Crossman and Herman Sielcken, by Dill & Baldwin, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

I. That the supreme court of the State of New York at the trial of the issues between the plaintiffs in error and defendants in error herein, erroneously permitted said defendants in error to rely for their defense upon the provisions of chapter 661 of the Laws of 1893 of New York.

II. That the said court at the trial of the said issues erroneously refused to permit counsel for plaintiffs in error to ask, for the purpose of showing that there was an established interstate and foreign trade and commerce in coffees colored as were those in question and adulterated within the meaning of the provisions of the said statute of New York, chapter 661 of the Laws of 1893, the following questions of the witness Theodor G. Lurman. (Fol. 343)

Q. Mr. Lurman did you previously to this controversy with Crossman deal in adulterated or colored coffees?

248 Mr. Fox: I submit that it is irrelevant, not rebuttal and nothing whatever to do with this case.

Objection sustained. Exception taken.

Q. I should also like to ask for the purpose of having it upon the record, whether previous to this transaction, six years ago, you had powdering, polishing or covering of coffees taken place or done at that time?

Mr. Fox: Objection.

Objection sustained. Exception taken.

III. That the said trial court committed like error in sustaining the objection of counsel for defendants in error to the following question asked during the examination of the witness Columbus O'Donnell Lee:

Q. Is it a fact that previous to the time that this controversy arose polished and colored coffees were regularly in demand in certain parts of the United States?

Mr. Fox: I object to that as not relevant and not rebuttal.
Objection sustained. Exception taken. (Fol. 369.)

IV. That the said trial court committed like error in sustaining the objection of counsel for defendants in error to the following offer in evidence made by counsel for plaintiffs in error of the testimony of the defendant Theodor G. Lurman, given at a former trial:

Mr. Kellogg: I also offer in evidence the entire testimony of the defendant Lurman, from the stenographer's minutes in the first record, being that on pages 117 to 158 inclusive.
Testimony indicated marked Plaintiffs' Exhibit Z for identification, printed on page 167 of appendix.
Mr. Fox: I object to the court receiving an offer in that general form of forty-one pages of testimony. The court cannot rule upon forty-one pages of testimony.

Mr. Kellogg: If your honor does not think it is admissi-
249 ble as an entirety, I shall offer certain parts of it. I offer it first as an entirety. Your honor does not think it proper. It is of similar purport as the other testimony I have offered.

Mr. Fox: With that statement I am content.
Objection sustained. Exception taken by counsel for the plaintiffs.
Mr. Kellogg: I offer in evidence part of Mr. Lurman's testimony beginning at the bottom of page 152 and extending——
Mr. Fox: Why didn't you ask them when you had Mr. Lurman on the stand?
Mr. Kellogg: I asked them all and they were ruled out. I now offer them as admissions made by him on a preceding trial, and they have been admitted without objection.
Mr. Fox: I object to that as irrelevant. My friend says you have ruled it out and I think you have. I object to it as irrelevant and not rebuttal.
The Court: Objection sustained and exception.
Testimony indicated marked Plaintiffs' Exhibit W W for identification, printed on page 149 of appendix.
(Fols. 459–461) (463–465.)

The testimony excluded by the above rulings is as follows:
Q. Did your firm during this period which you were with it deal in polished or colored coffees?
A. A portion of the time we dealt in them.
Q. What portion of the time?
A. We did not deal in colored coffees after this controversy arose. (Fol. 606).
Q. Have you had much coffee polished?
A. We have had some coffee polished, I cannot say how much.
Q. Much of it; a considerable quantity?
A. Extending over the period of my connection with the firm there was more or less polished.
250 Q. A considerable quantity, wasn't it?
A. Not of late years.

Q. Well, before late years—before the controversy arose?

A. I do not date the time of the decline in our sales of polished coffees from the date of this controversy because the date of the decline in polished coffee I think was probably prior to that.

Q. What do you mean by decline in polished coffee?

A. I mean when there was not the same demand for polished coffee; that is, that there was fifteen years ago or ten years ago.

Q. Not the same demand?

A. No, sir.

Q. Do you think the realization of the sin of selling polished coffees was brought about by the lack of demand in any degree, Mr. Williams?

A. What is that?

Q. Do you think the decline of the demand for polished coffees accounts at all for your sudden realization of the fact that it was sinful to do business in it?

A. No, sir, I cannot say that I do.

Q. Can you say that you do not?

A. I can say, as I have said before, in my judgment the decline in polished coffees dates prior to 1894.

Q. Since that time you have ceased handling polished coffees?

A. We have ceased handling polished coffees.

Q. Was there a decline in the demand for colored coffees?

A. I cannot say because we were not handling them.

Q. But you had handled them before that time, had you not?

A. We had to a limited extent.

Q. Had there been prior to that time, any decline in the general demand for polished, coated, or manipulated coffees?

A. I think there had.

Q. I wish you would tell me to your best recollection which portion of your general business prior to this controversy was in polished or colored coffee; that is, in a general way?

A. I could not assume to tell you what percentage, but a very small percentage. (Fols. 616–621.)

251 Q. At times you have dealt in artificially colored coffees?

A. I have.

Q. To what extent?

A. To a very limited extent.

Q. What has been your method and what has been the forms of your contracts in dealing in artificially colored coffees?

A. When I have furnished any artificially colored coffee it has been sold on sample. (Fol. 676.)

Q. With regard to such colored coffees, has your firm handled polished coffees during that period, prior to this controversy?

A. Yes, sir.

Q. To what extent?

A. To a very limited extent.

Q. In what trade?

A. In the southern trade.

Q. And southwestern trade?

A. Yes, sir. (Fol. 698.)

Q. I did not ask you about that. If you had thought before that this was deception upon the consumer, why did you not discontinue it before?

A. I had discontinued it at times.

Q. Why did you take it up again if so?

A. Because customers demanded it.

Q. Did the consumer demand it of you?

A. No.

Q. Then it was deception to the consumer in one case, it was just as much deception in another irrespective of what the consumer wanted?

A. I sold it to the wholesale dealer.

Q. But you knew it was going into consumption?

A. I did.

Q. You know if it was deception to the consumer in one case it would be just as much deception in another whatever your own customer might have demanded from you?

A. I realized that and shut down on the whole thing.

Q. After having done it for ten years?

A. Not ten years.

Q. How long?

A. There were periods when I did not sell any colored coffee at all.

Q. Then you took it up again?

A. When they demanded it.

Q. When who demanded it?

A. Customers.

Q. Not the consumer?

A. No. (Fols. 768–770.)

252 V. That the said supreme court of the State of New York erred in overruling and denying the motion made by counsel for plaintiffs is error at the close of the testimony and before the charge to the jury, for a direction of a verdict for the plaintiff upon the following ground:

"Third. That the statute itself (chapter 661, Laws of 1893, of New York) so far as it is now attempted to be applied to goods from a foreign country, and which come within the operation of the United States laws, and which were in the original package, so far as this contract is concerned, it appears by the stipulation and the evidence is unconstitutional and therefore inoperative.

Motion to direct a verdict denied.

Exception taken by counsel for the plaintiffs upon each ground of the motion. (Fols. 470–471.)

VI. That the supreme court of the State of New York erroneously held for valid a certain statute of the State of New York, the same being chapter 661 of the Laws of 1893, which said statute is a regulation of commerce with foreign nations and among the States and

is repugnant to article I, sec. 8, ch. 3 of the Constitution of the United States.

VII. That the court of appeals of the State of New York, and the appellate division of the supreme court of the first department of the said State erroneously held the said statute to be a valid exercise of the police power of the State and upon this ground erroneously affirmed the judgment of said trial court.

VIII. That it was error on the part of the said supreme court, the appellate division and the court of appeals of the State of New York, to apply the said statute to this case for the reason that said statute in this application prohibited the sale of coffee, which
253 is an article of interstate and foreign commerce, and which, in this instance, was imported from a foreign country, Brazil, in contravention of the third clause of the sixth section of article I. of the Constitution of the United States.

IX. That the said courts of the State of New York erroneously applied the provisions of said statute to the facts in this case, since said statute is repugnant to the act of Congress, Laws of 1890, chapter 839.

By reason of which before assigned errors these plaintiffs in error aver that they are being deeply damaged and aggrieved, in violation of the third clause of the sixth section of the first article of the Constitution of the United States, and the said George W. Crossman and Herman Sielcken, plaintiffs in error, pray that the said judgment of the supreme court of the State of New York, entered, upon the affirmance and direction of the court of appeals of said State, the 4th day of June, 1902, be reversed, and the cause remanded for such further proceedings as may be determined by this court.

DILL & BALDWIN,
Attorneys for Plaintiffs in Error.

254 [Endorsed:] Supreme Court of the United States. George W. Crossman, *et al.*, plaintiffs in error, against Theodor G. Lurman *et al.*, defendants in error. Order, petition and assignment of errors. Dill & Baldwin, attorneys for pl'ffs in error, 27 Pine street, New York city. Re'v'd. R. W. P. July 24, 1902.

Copy rec'd Aug. 2—'02.

C. S. DAVISON,
Def'ts' Att'y.

255 UNITED STATES OF AMERICA, *ss:*

To Theodor G. Lurman and Benjamin D. Williams, composing the firm of Theodor G. Lurman & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the city of Washington on the second Monday of October next pursuant to a writ of error duly filed in the clerk's office of the supreme court of New York, first judicial district in that certain action in which George

W. Crossman and Herman Sielcken composing the firm of W. H. Crossman & Brother are plaintiffs in error and you are defendants in error to show cause, if any there be, why the judgment entered against said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Rufus W. Peckham, associate justice of the Supreme Court of the United States this 30th day of July, in the year of our Lord one thousand nine hundred and two.

R. W. PECKHAM,
Justice Sup. Ct. U. S.

256 [Endorsed:] United States Supreme Court. George W. Crossman, *et al.*, pl'ffs in error, against Theodor G. Lurman, *et al.*, def'ts in error. Citation. Dill & Baldwin, attorneys for pl'ffs in error, 27 Pine street, New York city.

Service of within citation is hereby admitted this 2nd day of Aug. 1902.

C. S. DAVISON,
Attorney for Def't.

Endorsed on cover: File No. 18,648. New York supreme court. Term No. 117. George W. Crossman and Herman Sielcken, composing the firm of W. H. Crossman & Brother, plaintiffs in error, *vs.* Theodor G. Lurman and Benjamin D. Williams, composing the firm of Theodor G. Lurman & Company. Filed August 16, 1902.

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Supreme Court of the United States

OCTOBER TERM, 1903.

No. 117.

GEORGE W. CROSSMAN and HERMAN SIELCKEN,
Plaintiffs-in-Error,

against

THEODORE G. LURMAN and BENJAMIN D. WILLIAMS,
Defendants-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR

DILL & BALDWIN,
Solicitors for Plaintiffs-in-Error.

FREDERIC R. KELLOGG & ARTHUR J. BALDWIN,
Of Counsel.

No. 18,648.

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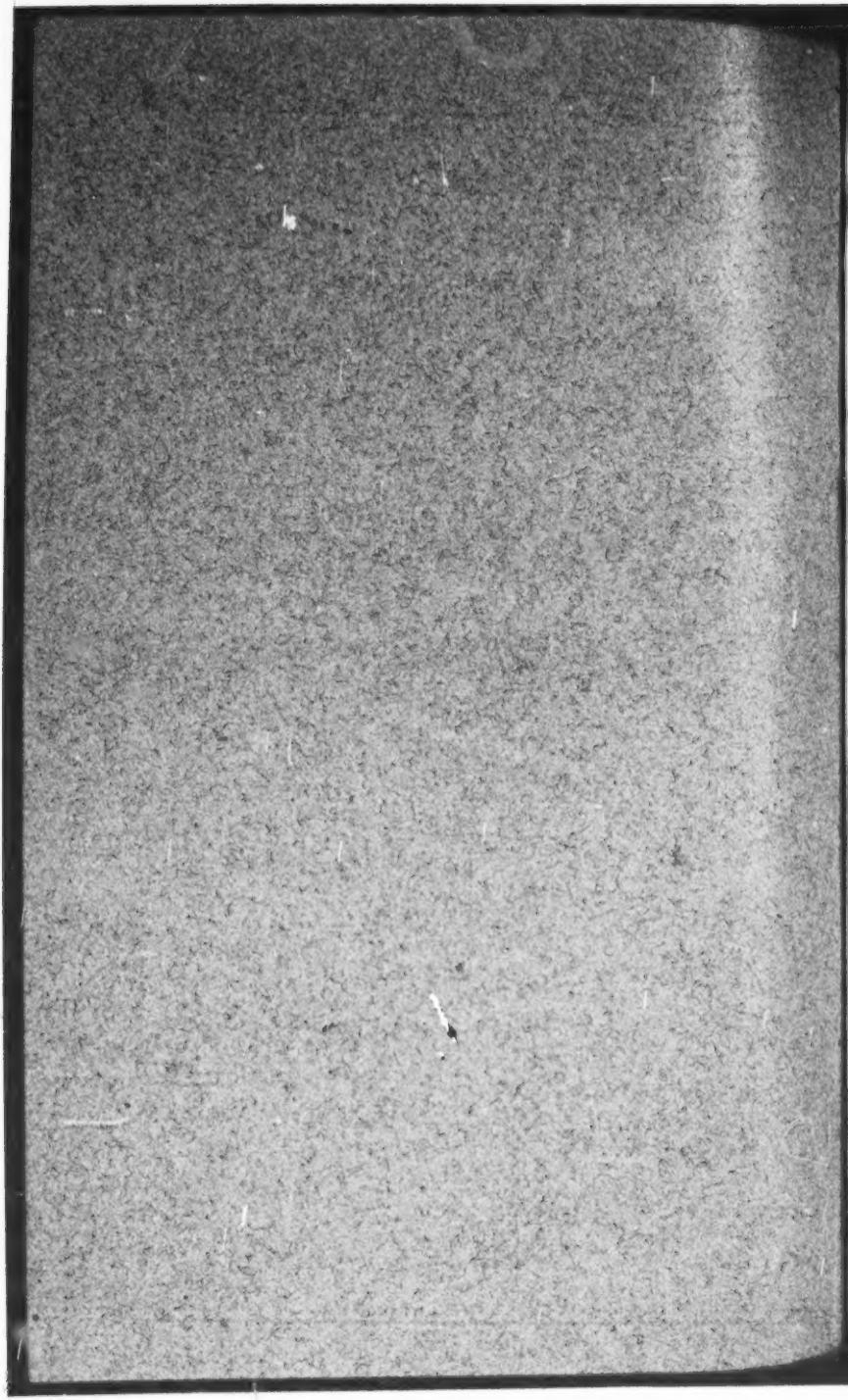

APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.

Supreme Court of the United States.

GEORGE W. CROSSMAN and Herman Sielcken, composing the firm of W. H. Crossman & Bro., Plaintiffs-in-Error,

against

THEODORE G. LURMAN and Benjamin D. Williams, composing the firm of Theodor G. Lurman & Co.,
Defendants-in-Error.

No. 18648.
October Term, 1903. No. 117.

BRIEF FOR PLAINTIFFS-IN-ERROR.

Statement of Facts.

This cause comes before this Court upon a writ of error to the Supreme Court of the State of New York for the First Judicial Department.

I.—NATURE OF THE ACTION.—The suit was commenced to recover damages sustained by the plaintiffs-in-error by reason of the failure of the defendants-in-error to accept certain coffees tendered to them by the plaintiffs-in-error on or about August 14th, 1894, under an executory contract entered into on July 17th, 1894.

II.—NATURE OF THE DEFENSE.—The ground upon which the defendants-in-error claimed to be justified in refusing this tender was that the coffees in question had been colored, coated, polished and powdered whereby damage was concealed and they were made to appear better than they really were and of greater value, in contravention of the provisions of the Public Health Law of New York (Laws of 1893, Ch. 661, Sec. 41, being Ch. 25 of the General Laws of the State of New York), forbidding the selling or offering for sale of adulterated foods and giving a definition to the term adulteration.

III.—THE ESSENTIAL FACTS INVOLVED.—These are as follows:

1. The plaintiffs-in-error are residents of the State of New York (See allegation of complaint, p. 4, admitted in the answer, p. 7).

2. The defendants-in-error at the same time resided and carried on their business in the State of Maryland (*id*).

3. The contract related to 500 bags of Rio coffee which were then in Rio de Janeiro and which by the terms of the contract were to be thereafter shipped at Rio de Janeiro to New York by the steamer "Catania" (p. 14).

4. The coffee was to average in grade about standards Nos. 8 and 9 of the Coffee Exchange of the City of New York (*p. 14*). *These were the lowest grades dea't in* (*p. 50*).

5. The contract further provided that the coffee on arrival should be graded by Messrs. Mackey & Small, (p. *15*) and that in the event of their grading being unsatisfactory the buyer should appoint a licensed grader, and that in the event of his average grading differing from that of the vendor, and

THE PROVISIONS OF THE STATUTE OF NEW YORK.

These are as follows:

"Sec. 41. Adulterations.—No person shall within the State manufacture, produce, compound brew, distill, have, sell or offer for sale any adulterated food or drug. An article shall be deemed to be adulterated within the meaning of this act * * * in case of food * * *

6. If it be colored or coated or polished or powdered whereby damage is concealed or it is made to appear better than it really is or of greater value." Laws of 1893, Chap. 661, Sec. 41 being Chap. 25 of the General Laws of the State of New York.

in case of their failure to agree, they should mutually select a third grader also licensed to act as arbitrator in the matter (p. *15*).

6. The reference in the contract to standard numbers 8 and 9 of the Coffee Exchange of the City of New York is to the lowest of certain grades or classes of coffees established by the Coffee Exchange, which classes are based upon certain standard samples (p. *13*).

7. Such standard samples at all times involved were coffees which were not adulterated within the meaning of the term as defined by the laws of New York (p. *12*).

8. The coffees were imported from Brazil. On or about August 14th, 1894, the steamship Catania arrived in New York carrying 500 bags of Rio coffee consigned to the plaintiffs (p. *12*). Thereafter, in the ordinary course of business, this coffee was tendered as an entirety by the plaintiffs to the defendants and was refused by them (p. *12*).

9. Thereafter, the coffee was graded by Mackey & Small, and the results were unsatisfactory to the defendants, and they thereafter appointed a licensed grader to grade the coffee and an irreconcilable difference between his gradings and those of Mackey & Small resulted (alleged in complaint p. *5* and *6*; not denied by answer).

10. Thereafter, a third licensed grader was appointed pursuant to the contract, to act as arbitrator in the matter. All samples and detailed gradings were duly submitted to him and the average grading of the coffee was duly ascertained by him (alleged in complaint p. 7; not denied in answer).

11. Upon the grading by the arbitrator, it was duly found that the said coffee averaged in grade about standard numbers 8 and 9 of the Coffee Ex-

change of the City of New York, that the average quality of the coffee was in all respects as called for by the terms of the contract, and that the coffee and each and every part thereof was a good delivery under the terms of the contract, and that the sale price thereof, upon the basis provided by the contract, was $9,269.80 (alleged in complaint, p. 7, and not denied in the answer).

12. After the refusal of the defendants to accept the coffee it was duly sold at public auction, and a net loss of $1,300.80 resulted (alleged in complaint p. 8; not denied in the answer).

13. Thereupon this suit was commenced for the purpose of reimbursing the plaintiffs for the damages thus sustained, and in the defendant's answer they seek to escape liability solely upon the ground of the alleged adulteration under the New York Statute.

14. It is conceded by the plaintiffs that about 2-5 of the coffee tendered had upon it foreign coloring matter, but such matter was not added by the plaintiffs, who themselves imported the goods from Brazil under a similar contract.

And it must be kept in mind, that *there is not even a claim on the part of the defendants that this coloring matter was in the least degree deleterious to the health of the consumer* (p. 88).

15. *And it is furthermore clear that no deception was practiced or attempted to be practised upon the purchaser.* The coffees were sold, not as high grade goods, but as the lowest grade coffees dealt in, and at the regular price for low grade coffees; and the purchaser nowhere claims to have been for an instant deceived by their appearance. *That they were of the grade contracted for is settled by the arbitration.*

IV.—THE PREVIOUS PROCEEDINGS.—This action has been tried three times in the lower courts.

The first time the plaintiffs were successful, but the judgment was reversed on the appeal to the Appellate Division of the N. Y. Supreme Court, First Department.

The second time the defendants were successful but the judgment also was reversed upon the plaintiffs' appeal.

The third time the defendants were again successful and the judgment in their favor has been affirmed by the Appellate Division and by the Court of Appeals of the State of New York.

V. THE ASSIGNMENTS OF ERROR ARE AS FOLLOWS:

I. That the Supreme Court of the State of New York at the trial of the issues between the plaintiffs-in-error and defendants-in-error herein, erroneously permitted said defendants-in-error to rely for their defence upon the provisions of Ch. 661 of the Laws of 1893 of New York.

II. That the said Court at the trial of the said issues erroneously refused to permit counsel for plaintiffs-in-error to ask, for the purpose of showing that there was an established interstate and foreign trade and commerce in coffees colored as were those in question and adulterated within the meaning of the provisions of the said statute of New York, Ch. 661 of the Laws of 1893, the following questions of the witness Theodor G. Lurman (p. 60):

Q. Mr. Lurman, did you previously to this controversy with Crossman deal in adulterated or colored coffees?

> Mr. Fox: I submit that it is irrelevant, not rebuttal and nothing whatever to do with this case.

Objection sustained. Exception taken (p. 60).

Q. I should also like to ask for the purpose of having it upon the record, whether previous to this transaction six years ago, you had powdering, polishing or covering of coffees taken place or done at that time?

Mr. Fox: Objection.

Objection sustained. Exception taken (p. 60).

III. That the said Trial Court committed like error in sustaining the objection of counsel for defendants-in-error to the following question asked during the examination of the witness Columbus O'Donnell Lee:

Q. Is it a fact that previous to the time that this controversy arose, polished and colored coffees were regularly in demand in certain parts of the United States?

Mr. Fox: I object to that as not relevant and not rebuttal.

Objection sustained. Exception taken (p. 65).

IV. That the said Trial Court committed like error in sustaining the objection of counsel for defendants-in-error to the following offer in evidence made by counsel for plaintiffs-in-error of the testimony of the defendant Theodor G. Lurman, given at a former trial:

Mr. Kellogg: I also offer in evidence the entire testimony of the defendant Lurman, from the stenographer's minutes in the first record, being that on pages 117 to 158 inclusive.

Testimony indicated marked plaintiff's

Exhibit Z for identification, printed on p. 117 *et seq.*

Mr. Fox: I object to the Court receiving an offer in that general form of forty-one pages of testimony. The Court cannot rule upon forty-one pages of testimony.

Mr. Kellogg: If your Honor does not think it admissible as an entirety, I shall offer certain parts of it. I offer it first as an entirety. Your Honor does not think it proper. It is of similar purport as the other testimony I have offered.

Mr. Fox: With that statement I am content.

Objection sustained. Exception taken by counsel for the plaintiffs.

Mr. Kellogg: I offer in evidence part of Mr. Lurman's testimony beginning at the bottom of page 152 and extending—

Mr. Fox: Why didn't you ask them when you had Mr. Lurman on the stand?

Mr. Kellogg: I asked them all and they were ruled out. I now offer them as admissions made by him on a preceding trial and they have been admitted without objection.

Mr. Fox: I object to that as irrelevant. My friend says you have ruled it out and I think you have. I object to it as irrelevant and not rebuttal.

The Court: Objection sustained and exception.

Testimony indicated marked Plaintiffs' Exhibit W W for identification, printed on p. 103.

The testimony excluded by the above rulings is as follows:

Q. Did your firm during this period which you were with it deal in polished or colored coffees? A. A portion of the time we dealt in them.

Q. What portion of the time? A. We did not deal in colored coffees after this controversy arose (p. 105).

* * * * * *

Q. Have you had much coffee polished? A. We have had some coffee polished, I cannot say how much.

Q. Much of it, a considerable quantity? A. Extending over the period of my connection with the firm there was more or less polished.

Q. A considerable quantity, wasn't it? A. Not of late years.

Q. Well, before late years—before the controversy arose? A. I do not date the time of the decline in our sales of polished coffees from the date of this controversy because the date of the decline in polished coffee I think was probably prior to that.

Q. What do you mean by decline in polished coffee? A. I mean when there was not the same demand for polished coffee; that is, that there was fifteen years ago or ten years ago.

Q. Not the same demand? A. No, sir.

Q. Do you think the realization of the sin of selling polished coffees was brought about by the lack of demand in any degree, Mr. Williams? A. What is that?

Q. Do you think the decline of the demand for polished coffees accounts at all for your sudden realization of the fact that it was sinful to do business in it? A. No, sir, I cannot say that I do.

Q. Can you say that you do not? A. I can say, as I have said before, in my judgment the decline in polished coffees dates prior to 1894.

Q. Since that time you have ceased handling polished coffees? A. We have ceased handling polished coffees.

Q. Was there a decline in the demand for colored coffees? A. I cannot say, because we were not handling them.

Q. But you had handled them before that time, had you not? A. We had to a limited extent.

Q. Had there been prior to that time, any decline in the general demand for polished, coated or manipulated coffees? A. I think there had.

Q. I wish you would tell me to your best recollection which portion of your general business prior to this controversy was in polished or colored coffee; that is, in a geenral way? A. I could not assume to tell you what percentage, but a very small percentage (pp. 107-108).

* * * * * *

Q. At times you have dealt in artificially colored coffees? A. I have.

Q. To what extent? A. To a very limited extent.

Q. What has been your method and what has been the forms of your contracts in dealing in artificially colored coffees? A. When I have furnished any artificially colored coffee it has been sold on sample (p. 119).

* * * * * *

Q. With regard to such colored coffees, has your firm handled polished coffees during that period, prior to this controversy? A. Yes, sir.

Q. To what extent? A. To a very limited extent.

Q. In what trade? A. In the southern trade.

Q. And southwestern trade? A. Yes, sir (pp. 123-124).

* * * * * *

Q. I did not ask you about that. If you had thought before that this was deception upon the consumer, why did you not discontinue it before? A. I had discontinued it at times.

Q. Why did you take it up again, if so? A. Because customers demanded it.

Q. Did the consumer demand it of you? A. No.

Q. Then it was deception to the consumer in one case, it was just as much deception in another ir-

respective of what the consumer wanted? A. I sold it to the wholesale dealer.

Q. But you knew it was going into consumption? A. I did.

Q. You know if it was deception to the consumer in one case it would be just as much deception in another whatever your own customer might have demanded from you? A. I realized that and shut down on the whole thing.

Q. After having done it for ten years? A. Not ten years.

Q. How long? A. There were periods when I did not sell any colored coffees at all.

Q. Then you took it up again? A. When they demanded it.

Q. When who demanded it? A. Customers.

Q. Not the consumers? A. No (p. 137).

V. That the said Supreme Court of the State of New York erred in overruling and denying the motion made by counsel for plaintiffs-in-error at the close of the testimony and before the charge to the jury for a direction of a verdict for the plaintiff upon the following ground:

"Third. That the statute itself (Ch. 661, Laws of 1893, of New York) so far as it is now attempted to be applied to goods from a foreign country, and which come within the operation of the United States laws, and which were in the original package, so far as this contract is concerned, it appears by the stipulation and the evidence is unconstitutional and therefore inoperative.

Motion to direct a verdict denied.

Exception taken by counsel for the plaintiffs upon each ground of the motion (pp. 83, 84).

VI. That the Supreme Court of the State of New York erroneously held for valid a certain statute of the State of New York, the same being Ch. 661

of the Laws of 1893, which said statute is a regulation of commerce with foreign nations and among the States and is repugnant to Article I, Sec. 8, Ch. 3 of the Constitution of the United States.

VII. That the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court of the First Department of said State, erroneously held the said statute to be a valid exercise of the police power of the State and upon this ground erroneously affirmed the judgment of said Trial Court.

VIII. That it was error on the part of the said Supreme Court, the Appellate Division and the Court of Appeals of the State of New York, to apply the said statute to this case for the reason that said statute in this application prohibited the sale of coffee, which is an article of interstate and foreign commerce, and which in this instance was imported from a foreign country, Brazil, in contravention of the third clause of the sixth section of Article I of the Constitution of the United States.

IX. That the said Courts of the State of New York erroneously applied the provisions of said statute to the facts in this case, since said statute is repugnant to the act of Congress, Laws of 1890, Ch. 839.

VI. THE QUESTIONS TO BE RAISED UPON THIS WRIT OF ERROR.

The propositions which the plaintiffs-in-error now desire to urge upon this Court in connection with the foregoing assignments of error are the following:

1. That the State statute quoted, so far as it is sought to affect a contract between citizens of the State of New York as sellers and citizens of another State (to wit: Maryland) as buyers, and re-

lating to goods which at the time of the contract were located in the Republic of Brazil, and which pursuant to the contract were to be imported into the United States, is unconstitutional as interference with foreign and interstate commerce, and cannot be defended as an exercise of the police power of the State of New York.

2. That the plaintiffs-in-error were deprived of a constitutional right in that they were not allowed to show among other things, that the coffees in question were imported for the purpose of being re-sold in the Southern and Southwestern States of this country and not in the State of New York, and that therefore the police power of the State of New York could have no proper operation with regard to such coffees.

3. That the plaintiffs-in-error were deprived of a constitutional right in not being allowed to show that colored coffees precisely like those in question had been for a large number of years, established and recognized commercial articles in various portions of the United States other than the State of New York, and that, therefore, the statute in question as applied to deliveries of such coffees in the original packages in which they were imported into the United States, and to non-residents of the State of New York was unconstitutional and void.

4. That the goods in question, even in the light of the jury's verdict, are not such improper articles as to be deprived of the protection afforded by the Constitution of the United States to articles of commerce.

5. That as Congress has in the exercise of its power enacted legislation as to the importation of adulterated foods pursuant to the terms of which the coffees in question were not adulterated and were properly imported into the United States,

and as these coffees had been inspected and admitted into the United States by the United States officials, a State statute in effect prohibiting the delivery of such coffees in the original packages in which they were imported is unconstitutional and void.

These points will be considered separately.

POINT I.

The State statute quoted so far as it is sought to affect a contract between citizens of the State of New York as sellers and citizens of another State (to wit, Maryland), as buyers, and relating to goods which at the time of the contract were located in the Republic of Brazil, and which pursuant to the contract were to be imported into the United States, is unconstitutional as interference with foreign and interstate commerce, and cannot be defended as an exercise of the police power of the State of New York.

This point is raised under the assignments of error numbered I, V, VI, VII, VIII, and IX (p. 169-173).

The Court will keep in mind the following facts:

1. That the coffees at the time of the making of the contract were in the Republic of Brazil and were by the terms of the contract to be imported into the United States upon the steamship Catania (p. 14).

2. That the plaintiffs at the time of the con-

tract were residents of and doing business in the State of New York (p. 4).

3. That the defendants at all these times resided and carried on their business in the State of Maryland (p. 4).

4. That the memorandum of contract signed by the brokers was accepted by the defendants (p. 15) the point of which is that the place where the contract was thus accepted was presumably the State of Maryland, where the defendants resided and carried on their business.

5. That the contract called for the delivery to the defendants of the identical bags of coffee thus imported into the United States—500 bags Rio coffee to be shipped at Rio—that is to say, that it was an original package contract (p. 14). The question as to whether it was an original package contract or not is, however, of no great materiality here, inasmuch as the contract was not to sell goods already imported, but was to *import these identical coffees*.

From these facts, it appears that there never was an instant of time at which these coffees became a part of the general bulk of merchandise of the State of New York.

Prior to the contract they were in the Republic of Brazil.

And by the contract itself they were to be imported into the United States of America for delivery, not to any citizen of the State of New York but to residents of an *entirely different jurisdiction*, with whose affairs the State of New York had nothing whatever to do.

It is therefore seen that this statute as construed by the highest Court of New York purports to permit a citizen of another State to refuse to accept a

delivery of goods imported into the United States from a foreign country and in their original packages, which goods have been passed by the United States officials at the port of New York and which goods have been arbitrated upon by the grader of the New York Coffee Exchange named in the original contract, and have been found to be a good delivery under the terms of the agreement.

The argument upon which this operation of the statute is defended is based upon the decision in *Plumley v. Mass.* (155 U. S., 461), and similar cases, in which this Court reiterated the well-settled rule that the constitutional protection of foreign and interstate commerce does not apply to articles which the State in the exercise of its police power for the protection of its citizens has properly declared not to be legitimate articles of commerce at all.

It is, however, submitted that this doctrine, which we do not in the least question, has no proper application to the present case for the following reasons:

1. The universally recognized basis of the police power of a State is the right to protect the health, morals, safety and property of *its* citizens.

License cases, 5 How., 504.
Sherlock v. Alling, 93 U. S., 103.
Robbins v. Taxing District, 120 U. S., 489.
Smith v. Alabama, 124 U. S., 476.
Bowman v. R. R., 125 U. S., 465.
Dent v. West Virginia, 129 U. S., 114-122.
Brimmer v. Rebman, 138 U. S., 282.
Crutcher v. Com. of Kentucky, 141 U. S., 47.
United States v. Knight, 156 U. S., 1.
West. Union S. Co. v. James, 162 U. S., 653.

Hennington v. Georgia, 163 U. S., 299.
Schollenberger, v. Penn., 171 U. S., 1-24.
Railroad v. Ohio, 173 U. S., 285.

"Any regulation of the subject (*i. e.*, commerce) by the States, except in matters of *local* concern only, is repugnant to such freedom."

Robbins v. Taxing District, *supra*.

"The validity of the statute is based upon the general power of the State to enact such laws in relation to persons and property *within its borders* as may promote the public health, the public morals, and the general prosperity and safety of *its* inhabitants."

Western Union T. Co. v. James (*supra*).

"These decisions rest upon the undoubted right of the States of the Union to control *their purely internal affairs*" (*Leisy v. Hardin*, 135 U. S., 122).

"All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. *They are self-defensive.*" *Re Sanders*, 52 F. R., 807.

The foregoing authorities contain over and over again the same principle either expressly repeated or everywhere assumed; and in no case of which we are cognizant is there any intimation that this power may be exercised by one State *with reference to matters affecting not its own citizens but those of some other jurisdiction*.

2. The principle is recognized in the utmost fullness in the *Plumley* case itself. Thus the Court said:

"It is within the power of a State to exclude from *its* markets any compound manufactured in another State which has been artificially colored or adulterated so as to cause

it to look like an article of food in general use" (p. 478).

"The Court should not strike down a legislative enactment of a State—especially if it has direct connection with the social order, the health and the morals of *its* people" (p. 479).

In two other places not on page 479, *the Court* speaks of the power of the States to protect *their* people and *its* people.

On looking at the facts in the *Plumley* case it is at once seen that the goods then in question had at the time of the sale been *previously brought* into the State of Massachusetts, and were not imported there pursuant to any contract which was involved in the suit; and furthermore that after thus being imported they were re-sold in the State by the plaintiff-in-error, and that there was no claim that the re-sale had been made to a citizen of a jurisdiction other than that of Massachusetts itself.

3. In the same line of thought it is universally accepted as the law that not only is this police power based upon the right of the State to protect *its own* citizens in matters of purely local concern, but further that the exercise of this power is limited *by the necessity* which exists for such protection.

"What that power (to wit, police power) is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of *domestic* order,, morals, health and safety. * * * While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within *its* borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of *self-protection* it may establish quarantine and reasonable inspection

laws, *it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection.* * * * In coming to such a conclusion we have not overlooked the decisions of very respectable Courts in Illinois, where statutes similar to the one we have before us have been sustained (Yeazel v. Alexander, 58 Ill., 254). Regarding the statutes as mere police regulations, intended to protect *domestic* cattle against infectious disease those Courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether therefore the statutes were not something more than the exertions of police power. That inquiry, they have said, was for the Legislature and not for the Courts. *With this we cannot concur.* The police power of a State cannot obstruct foreign commerce or interstate commerce *beyond the necessity for its exercise, and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.* And as its range comes very near to the field committed by the Constitution to Congress it is the duty of the Courts to guard vigilantly against any needless intrusion."

Hannibal R. R. v. Husen, 95 U. S., 465.
Mo. R. R. v. Haber, 169 U. S., 628-9.

"Any regulation of the subject (*i. e.*, interstate commerce) by the States *except in matters of local concern only* is repugnant to such freedom."

Walling v. Michigan, 116 U. S., 446.

Applying these principles to the present case, we ask the Court where can be found in the record any fact or thing *affecting in any degree the people of the State of New York*, or any question of local concern?

We believe that no such situation exists for the following reasons:

1. The design of the statute as construed by the Court of Appeals of New York is to prevent fraud and deception in the sale of articles of commerce (p. 166).

2. But the only fraud and deception with which the State of New York is concerned (arising out of contracts relating to property which was produced in a different country), is fraud and deception practiced *upon the people of the State of New York.*

3. And in this case we find that the contract in question involves no such point, but is made with *citizens of Maryland*, was presumably accepted by them in Maryland, that the goods when tendered were rejected by them by telegrams and letters sent from their place of business in Maryland (pp. 97-100) and that the entire matter instead of being one of local concern or one affecting the rights or safety of the people of the State of New York is purely extraterritorial and over which, it is submitted, the State of New York can exercise no jurisdiction.

4. Nor is this argument affected, we submit, by the fact that under the terms of the contract the property was to be imported into the State of New York and was physically in this State at the time when the tender was made.

For the Court will keep in mind that there is *no claim that the mere physical condition of this coffee was such as to endanger in the faintest degree the health, safety or rights of any citizen of the State of New York.*

This is not a case where the merchandise is infected so that a contagious disease might be spread either to people or to animals from its mere presence here. *It is not a case even of merchandise which is deleterious to the health of the person who consumes it.*

The sole and only basis for the attempted exer-

cise of the police power is the prevention of fraud and deception *to the person who buys;* and if as in the case at bar, the only person thus affected is a person with whom and for whom the State of New York has no concern, and if the goods in question, as is the case here, are imported from a foreign country to be delivered to a non-citizen in the original packages in which they were imported, it is submitted that the only possible basis for the exercise of the police power is shown to have no existence in fact.

The question involved, is, we submit, far reaching. The port of New York has been aptly termed the "country's mouth," receiving as it does the products of every country and every clime for distribution not merely among the citizens of the State of New York, but among the citizens of every hamlet in the United States of America.

Undoubtedly so far as the goods thus imported may be dangerous to the peace, happiness or safety of the citizens of New York, that State has a right to pass regulations regarding their introduction.

But this power must have a limit somewhere; *and we submit that it ceases to operate at the moment when the rights involved cease to be those of its non-citizens.*

If this point be attempted to be answered by the claim that the record does not show but that the defendant, although a non-resident, may have intended to resell this coffee in the State of New York and to its citizens, it then remains to call the Court's attention to the point that any possible claim of this nature would have been obviated by the evidence which was excluded by the Court below, and that such exclusion tended to deprive us of our constitutional rights.

POINT II.

The plaintiffs-in-error were deprived of a constitutional right in that they were not allowed to show among other things that the coffees in question were imported for the purpose of being resold in the Southern and Southwestern States of this country and not in the State of New York, and that therefore the police power of the State of New York could have no proper operation with regard to such coffees.

This point is raised by the assignments of error numbered II, III, IV (pp. 69, 170).

In the portions of the records therein alluded to, plaintiff's counsel sought to introduce both by direct testimony and by the admissions given upon the former trial by the defendants-in-error all of the facts relative to the nature and existence of the trade in and demand for colored coffees such as the ones in suit, and among other things as to the portions and States of the country from which this demand arose and in which it was intended to dispose of the coffees in question.

The entire line of testimony was objected to at the beginning of these inquiries (p. 60).

As the Court had ruled expressly that it would allow no evidence to be introduced except that relative to the actual condition of the coffees themselves as related to the statute (pp. 53, 55), and as this ruling covered the entire ground which plaintiffs sought to cover, it was of course unnecessary to occupy the time of the Court by more detailed inquiries than those which had been excluded.

It however appears even from the admissions made upon the preceding trial and excluded upon

this one, that this demand was limited to the southern and southwestern trade (p. 124).

And if the Court had permitted us, it was our intention and object to show at the last trial of the case not only these facts—which by themselves are ample to demonstrate that the consumption of these coffees was of no concern to the people of the State of New York—but to go into further details which would demonstrate this point beyond any possibility of argument.

If our preceding proposition is correct, to the effect that the State of New York has the right to legislate in matters only of purely local concern, and if upon the facts actually shown in the record, there could be any possible remaining question as to whether the matter was one of purely local concern, it is submitted that such doubt would have been entirely placed at rest by the evidence excluded, and that therefore its exclusion tended to deprive us of our right to atack the constitutionality of the statue as applicable to the case at bar.

If it be urged that the intent of the purchaser be immaterial, under the doctrine of *U. S. v. Knight* (*supra*), it need only be observed that this claim, if successful, *will of itself shut the defendant in error out of Court*, as it will leave the entire transaction to be adjudicated upon the facts contained in the record alone, as upon these facts the matter was certainly one outside of the jurisdiction of the State of New York.

POINT III.

The plaintiffs-in-error were deprived of a constitutional right in not being allowed to show that colored coffees precisely like those in question had been for a large number of years, established and recognized commercial articles in various portions of the United States other than the State of New York, and that therefore the statute in question as applied to deliveries of such coffees in the original packages in which they were imported into the United States and to non-residents of the State of New York was unconstitutional and void.

This point is raised by the assignments of error numbered II, III and IV, (pp. 169 and 170).

In the preceding portions of this brief we have assumed for the sake of argument that the merchandise here in question was of the class alluded to by the Court in the *Plumley* case as articles which are not legitimately the subject of commerce and dealings in which therefore would not be protected by the United States constitution if matters of local police regulation by the States were involved.

It is, however, clear that in cases of this description a party is always entitled to show if possible that the subject matter of the case, instead of being contraband, is as a matter of fact a legitimate and well-known article of commerce.

> "The first question to be considered is whether oleomargarine is an article of commerce."
>
> *Schollenberger v. Penn.*, 171 U. S., at p. 7.

At the trial below the plaintiffs-in-error sought to place upon the record all of the facts relative to the duration, existence, extent and nature of the demand for and trade in, coffees of the description of those involved in this case.

This evidence was sought to be brought out directly from the lips of the defendants themselves and also by showing their admissions on the previous trial; and as appears at p. 171, if the evidence even of the prior admissions had been admitted, we would have shown that there had been a demand for exactly this kind of coffee for upwards of 10 or 15 years prior to the trial, and that the defendants' firm had handled them during that period to a certain extent. It was the intention of the plaintiffs-in-error not merely to repeat as evidence what had been given before *but to go more in detail into the extent of this demand* and to show that the real reason for coloring coffees was the same as that which impels consumers of butter in certain sections of the country to prefer that it be colored yellow before they will purchase it.

The evidence which it was proposed to elicit would have certainly tended to show that instead of the coffees in question being treated for purposes of deception, they were treated for another and entirely different purpose, pursuant to a definite preexisting demand for and trade in, coffees of precisely that nature and with precisely the same artificial coloring; and that these coffees thus demanded for these reasons and thus traded in for a long period of years prior to this controversy had become a well-known and established article of commerce in other States than the State of New York, in which trade the State of New York had no reason to interfere for the protection of its own citizens and over which it had no jurisdiction or control.

For these reasons the exclusion of this testimony tended to deprive us of our right to attack the constitutionality of the statute as one interfering with foreign and interstate commerce in a well-known article of merchandise and in the original packages in which it was imported, and therefore, we submit, constitutes reversible error.

POINT IV.

The goods in question, even in the light of the jury's verdict, are not such improper articles as to be deprived of the protection afforded by the Constitution of the United States to articles of commerce.

In the preceding portion of our argument we have considered the case as though the verdict of the jury established that the goods in question were, like those in the Plumley case, "contraband of commerce," and were thus removed entirely from the protection of the United States Constitution and left solely to the mercy of the State police power.

We believe that even upon such an assumption the statute in question was unconstitutional for the grounds already stated.

But we also believe that the facts permit us to go deeper in the case at bar and to establish the claim set forth at the commencement of this subdivision of the brief.

Premising our remarks by the statement that if we are correct in this regard, it would, we think, certainly follow that under the guise of its police power the State could not prevent the sale of these goods in New York in the original packages in which they were imported (*Schollenberger v. Pa.*, 171 U. S., at p. 28. See *Hornblank v. Lagarle*,

60 F. R., 191 and cases cited); we call the attention of the Court to the following facts:

1. No claim whatsoever is made that the goods in question were deleterious to health (p. 88).

2. It is uncontradicted that a portion of these goods had upon them an artificial coloring matter, but that this coloring matter was not placed upon them by the plaintiffs or at their instigation, as the goods were tendered as imported from Brazil.

3. It is uncontradicted that the goods in question were coffees of certain of the merchantable grades recognized by the New York Coffee Exchange, and were sold as *coffees* and not as articles of a different nature, as was done in the *Plumley* case where oleomargarine was sold as butter.

4. Moreover, it is uncontradicted that the goods in question were of the *very lowest grades* of coffees recognized by the Coffee Exchange.

The contract called for "Standard Nos. 8 and 9" (p. 14), and the stipulation shows that only nine grades are dealt in under the New York Coffee Exchange standards (p. 13).

5. Again, we particularly call the attention of the Court to the fact that these coffees, however they may have been treated, and howsoever their natural appearance may have been altered, *were not attempted to be sold or delivered as being of any higher grade than* their true grade.

The arbitration alleged in the complaint and admitted in the answer settles conclusively the fact that the coffees in question *were of the contract grade;* that is to say, that they were within the standard numbers specified in the agreement. And the presence of the coloring matter did not prevent the coffees from being of the contract grades, for it was seen by the arbitrator (p. 66), and never-

theless the coffee is conceded by the answer to have been found up to contract.

And the price at which they were sold was the ordinary price of goods of this description, dependent for its exact ascertainment on the findings of the arbitrators (See contract, page 15, and stipulation, page 13).

6. Again, there is no claim anywhere in the record that the treatment of the coffees deceived the defendants for an instant as to the real grade of the goods. On the contrary, Mr. Lurman, admits, although he attempts to qualify it, that as soon as he examined the sample he saw that the coffees were of a low grade and were No. nines (p. 51). This is conclusively shown by the correspondence (pp. 98-100), and by the defendants seventh request to charge (pp. 93, 88).

It may be observed here that the contract itself places any question of deception *beyond the bounds of possibility*, for all questions that might arise between the parties were to be decided by expert arbitrators, and in this case were actually so decided, *and the decision was that the goods in question were exactly what the contract called for.*

7. Moreover, as we have already pointed out, had we been allowed to introduce the evidence which we offered, it would have appeared that goods of precisely this description, treated in this manner, were at the time well-known articles of commerce which had been long dealt in and which were thus dealt in pursuant to a definite demand for such articles from a particular part of the country, and that that particular part of the country had nothing to do with New York State.

Since this case contains no claim of damage to the health of any community whatsoever arising from the treatment to which these coffees were sub-

jected, it follows that the articles in question can only be considered as "contraband of commerce," if at all, upon the ground of fraud or deception committed or about to be committed—if not upon the people of the State of New York, at least upon somebody, somewhere.

But upon what grounds can such a claim of fraud be supported?

There can be no fraud without injury, either actual, or at least, probable.

So far as the *defendants* are concerned it is uncontradicted that they are not injured nor was any injury attempted to be perpetrated upon them. The goods were sold as being of the lowest grade of coffee. They were as a matter of fact, of the grades called for by the contract. They were sold at the price, not of higher grades but of these lower grades, and the defendants themselves knew from the very beginning just what they were. So far as they are concerned there was manifestly no fraud whatsoever nor could there be any fraud under such circumstances.

If then the theory of fraud be adopted as a sufficient basis for the exclusion of these articles from the ordinary protection afforded to commercial merchandise, it must be upon the hypothesis that some *persons other than the vendees* in this case were shown to be either actually defrauded or to be in danger of being defrauded by permitting this merchandise to enter general circulation.

We have already shown that the people of New York, for whose interests alone the Legislature of New York has power to act, have no interest whatsoever in this proposition or in this decision.

But even if it could be held that the statute can be supported upon the ground of protecting the interests of the citizens of other States—*where, we*

respectfully ask, is there in this record any evidence of such actual or contemplated or probable fraud upon those persons as would give the Legislature of the State of New York *or any legislature,* the jurisdiction to declare that the articles themselves are inherently non-commercial articles?

There is only, we submit, one possible theory upon which such a claim could be based; and that is, the possible danger that these low grade coffees thus treated might possibly be attempted to be resold by these defendants or by some one who might purchase from these defendants, *as high grade coffees* and at the price of high grade coffees, which, it will be claimed, they have been made to resemble by reason of the treatment to which they were subjected.

Now the *only ground* upon which such an assumption can rest is the *mere fact that the jury have found that the coffees have been made to look better than they really are or of greater value or that the damage in them has been concealed.*

But this fact alone cannot empower the legislature to say that the goods are so inherently fraudulent as to be absolutely contraband of commerce.

For there is not a scintilla of evidence that anybody, wheresoever located, has ever been in the habit of palming goods of this quality off on an unsuspecting public at a higher price than was warranted by their real value or as being better coffees than they really were or as being articles of an entirely different description than coffee itself.

Note here the essential difference between this case and the *Plumley* case. In the *Plumley* case oleomargarine was offered for sale in such a matter as to look exactly like butter and as to lead the public to believe that it was butter, without any explanation of its real nature, and it was held that *such*

a sale actually made was the proper basis for a prosecution under the statute.

But here there is not the least evidence of any such actual transaction or attempted transaction. The only transaction which is in evidence is the one between the plaintiffs and the defendants; and so far as this transaction is concerned it is absolutely and unequivocally above board in every particular. Nobody was deceived. No attempt was made to deceive, and the very contract itself made deception impossible.

The Court then, must, in the absence of any evidence upon the point, in order to apply the *Plumley* decision assume that in the future somebody else than the parties to this suit will certainly or probably attempt to use these articles for purposes of deception.

And the essential point in any such assumption in order that fraud may be held to exist, is not merely that somebody might think that these goods in question were better than they really were because of the concealment of damage, &c., *but the further assumption that the person who dealt in these goods would naturally or probably attempt to sell them as being, not merely, of their actual grade, but goods of a higher and superior grade and at the price, not of the low grade, but of such superior grades.*

Let us look for a moment at the results which would follow if the Court be authorized to adopt such an assumption as this as a sufficient basis for declaring all goods as to which such an assumption might be predicated, contraband of commerce.

Such an assumption might be made as to countless articles of merchandise which are dealt in daily.

We do not believe that we exaggerate when we say

that a large portion of all manufactured articles and of many other articles which form the subject-matter of modern commerce are treated by the producer, in such a way as to attempt to make them seem better than they really are, and to attempt to conceal damage. *It is the great aim of commerce to make the article sold attractive to the consumer.*

There is not an article of cheap furniture that is not given a high polish for the purpose of making it look attractive.

Every article of furniture covered with veneering is thus constructed for the purpose of making it seem of greater value than it really possesses.

There is not an article of plated ware which is not thus plated for the express purpose of concealing the metal beneath and of making the article look as though it were composed of the solid metal with which it is only plated.

There is not an article of cheap clothing upon which the resources of the manufacturer's ingenuity have not been exhausted so as to make it look better than it really is in the eyes of the purchaser.

The covers of the very law books which confront us are made of paper, with the thinnest possible coating of leather on the outside in order that they may resemble solid leather a quarter of an inch in thickness.

And so the list might be indefinitely expanded.

But are these facts alone sufficient to make these articles contraband so that the Legislature may in its wisdom declare that no man who sells such articles *irrespective of his intent in so selling them and of the manner of such sale*, shall be entitled to recover their *actual—and not their fictitious*—value.

And if the answer to this be in the negative, as it surely must be, can the Courts say that because the article in question may resemble something else,

therefore, it is probable that the purchaser of such an article will endeavor himself to resell it to some other person not at its real value, but at some fictitious value, and therefore, that the Court will not enforce the contract between the original parties, which contract was made in good faith and which was not attended nor attempted to be attended with any circumstance of deception?

Such is not, we submit, the doctrine of the *Plumley* case, which, in itself a border-line case, yet did not even attempt to restrain the sale of inferior articles *as such*, but only to prevent them from being disposed of *as something else*, or in such a manner as to deceive and defraud the public.

To now extend that decision to the limits of its application in this case would be indeed to reach the result suggested by the dissenting members of this Court in the *Plumley* case:

> "I deny that a State may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities.
>
> "In the language of KNOWLTON, J., in the dissenting opinion below, I am not 'prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the appearance of being wholly wool, when in fact it is in part cotton, can be a subject of commercial transactions, or that no jewelry which is not gold, but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations.'
>
> "Other illustrations will readily suggest themselves. The concession involves a serious circumscription of the realm of trade and destroys the rule by an unnecessary exception." (*Plumley vs. Massachusetts*, 155, U. S., 461, 481.)

If the contrary doctrine of the New York Court be adopted here, what a tremendously far-reaching and sweeping assertion it will be!

We earnestly and strongly submit that such is not and cannot be the law; and that in cases where fraud and deception is invoked as a basis for the police power which seeks to declare an article as contraband of commerce, there must be shown not merely such treatment of the article as makes it appear better than it really is—such treatment as will conceal damage—*but in addition, either in the particular case at bar or at the very least in the general conduct of the trade in such articles, such circumstances of attempted fraud and deception upon the public as would naturally and ordinarily lead the public to purchase the inferior article at the price of the superior article, or as would lead it to purchase one article under the supposition* (*as in the oleomargarine case*), *that an article of an entirely different nature in kind as well as in degree was being obtained*—and no such evidence here exists.

The mere concealment of defects is no sin. Life itself consists to a degree absolutely astonishing until we attempt to realize it in detail, of the concealment and attempted concealment of our own defects of every nature. It is only where this concealment is accompanied by such circumstances *as cause injury to others* that it becomes either morally or legally a crime.

And in this case no such crime has been committed and even if it be proper to indulge in hypothesis, there is not a scintilla of evidence that it probably would be committed at any time in the future.

For no reason other than a falling of the market price these defendants had been permitted, under

the guise of benefactors of the public to escape from the consequences of their own contract, and from their duty to accept goods which they concede were of the grade which they contracted for, through the operation of a statute which if intended to cover a situation like the one here presented is, we earnestly submit, wholly without the power of the legislature to enact. This result we believe to be a grave injustice.

To put in a brief manner what we have already attempted to state, we most earnestly urge upon the Court that unless there be some element of public morals or public health or public safety involved—none of which is present in this case—*every man has the right to offer for sale any article which he may possess, whether it be a defective article, whether it be an article artificially treated, whether it be made to look better than it really is or of greater value, or whether damage may have been concealed, always provided that he offers it for sale for what it really is and not for what it is not.*

If defective and damaged articles nevertheless have a market price as such, the owner of them, no matter how they have been treated, *has a right to offer them for sale at that market price* as long as he does not attempt by reason of the treatment to which they have been subjected to obtain a higher price for them than that which they are really worth, or to deceive the public as to their real nature.

Such articles are not *per se* contraband of commerce; and to hold that they were, would be to exclude from the channels of trade a proportion of the articles now dealt in which would be of enormous value and which would lead to such a disturbance of commerce as is absolutely incapable of estimation.

POINT V.

As Congress has in the exercise of its power enacted legislation as to the importation of adulterated foods pursuant to the terms of which the coffees in question were not adulterated and were properly imported into the United States, and as these coffees had been inspected and admitted into the United States by the United States officials, a State statute in effect prohibiting the delivery of such coffees in the original packages in which they were imported is unconstitutional and void.

This point is raised by the assignments of error numbered I, V, VI, VII, VIII and IX (pp. 169-173).

It is of course clear that the importation of adulterated foods is the proper subject of regulation.

It is also clear that the term "adulteration" is one of loose import and wide possible scope, needing clear definition.

This definition so far as articles imported into the United States is concerned, had been, prior to the passage of the New York statute clearly expressed by Congress in the Laws of 1890, Ch. 839, as referring to

> "Any adulterated or unwholesome food or drug, or any vinous, spiritous, or malt liquors, adulterated or mixed in with any poisonous or noxious chemical, drug or other ingredient injurious to health."

Provisions were made in this statute for the inspection of articles of food and to ascertain whether they came within the enumerated category.

The statute of the State of New York passed in

1893, under the construction given to it by the Court of Appeals of New York, attempted to *change the definition* thus given by Congress, even as applied to articles of food imported from other States.

Instead of adopting the meaning definitely fixed by congress to the effect that adulteration in order to be adulteration shall tend to affect the health of the citizen, the State Legislature attempts to give to the term a meaning entirely inconsistent, it is submitted, with that adopted by the national Legislature.

By the enactment of the United States statute Congress declared what goods of this description should be and should not be, legitimate articles of commerce so far as importation into the United States is concerned.

And it is earnestly submitted that having done this and having permitted the importation of these articles the State of New York had no power, by placing a different meaning on the term "adulteration," to nullify an act of the national Government and to prohibit the sale in the original packages of the articles thus imported.

The case is, we submit, covered by the following language of this Court:

> "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority

> of the people of a State, represented in the State Legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create" (Chief Justice Fuller in *Leisy v. Hardin*, 135 U. S., 100, 125).

And when in addition to this we remember that the State has not merely sought to prohibit the sale of these articles lawfully imported, to its *own* citizens, *but to citizens of other States as well*, and when we remember further that the attitude of the Courts with regard to this matter has been so strict that the plaintiffs have even been prohibited from showing as fully as they sought to do the utter lack of connection of this transaction with any question over which the local Legislature had any possible jurisdiction, it will be seen, we think, that the constitutional rights of the plaintiffs-in-error have been unquestionably violated.

POINT VI.

For the foregoing reasons it is submitted that the judgment below should be reversed with costs.

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ARTHUR J. BALDWIN,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 117.

GEORGE W. CROSSMAN and HERMAN SIELCKEN,
Plaintiffs in Error,

against

THEODORE G. LURMAN, and BENJAMIN D. WILLIAMS,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

DILL & BALDWIN,
Solicitors for Plaintiffs in Error.

FREDERIC R. KELLOGG &
ARTHUR J. BALDWIN,
Of Counsel.

No. 18,943.

10852

Supreme Court of the United States,

No. 18648.

OCTOBER TERM, 1903.

No. 117.

GEORGE W. CROSSMAN and Herman Sielcken,
Plaintiffs-in-Error,

against

THEODORE G. LURMAN and Benjamin D. Williams,
Defendants-in-Error.

Supplemental Brief for Plaintiffs-in-Error.

We respectfully request permission to submit the following additional memorandum to the Court relating to the point raised *during the argument by the Court.*

As to Inconsistency.

It was suggested that the verdict of the jury to the effect that the coffees were adulterated was inconsistent with the concession in the answer that the goods were as called for by the contract, since the contract related to Coffee Exchange standards, the arbitrators found.

and these Coffee Exchange standards were not themselves adulterated.

In answer to this we call attention to the following point:

1. Even if this were so, the fact remains that the only question submitted to the jury was not whether the good were up to contract, *but whether they were adulterated within the meaning of the New York statute.*

2. Hence if the statute be unconstitutional in its application to this state of facts, then it seems clear that the case was tried upon the wrong theory and that the cause should be sent back for a trial in which the statute cannot be urged as a defense.

3. Moreover, it is submitted that as a matter of fact, there is no inconsistency at all, since although the Coffee Exchange standards themselves were not adulterated, yet the contract does not call for coffees which are *exactly* the same as the Exchange standards, but calls for coffees "which shall *average in grade about*" these standards.

In other words *coffees are never uniform.* Variations of many kinds occur in quality, resulting from the presence of *imperfections of various sorts.* Hence, the only way that coffee can be graded is by approximation, made by experts who take into consideration all the circumstances of the case, including imperfections such as resulted from the treatment in the case at bar.

And it is conceded that in this case precisely this course was followed.

Hence, although the jury might perfectly well have found that a part of the coffees were treated as claimed by the defendants yet that finding is

not inconsistent with the finding of the arbitrators that the goods were of the contract grades, which were only required to be *approximately* of the Exchange standards.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1926

No. 311

GEORGE W. CROSSMAN AND ANOTHER,
Appellants,

against

THEODOR C. LURMAN AND ANOTHER,
Defendants-in-Error.

BRIEF FOR DEFENDANTS-IN-ERROR

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10835

Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 117.

GEORGE W. CROSSMAN and another,
Plaintiffs-in-Error,

against

THEODOR G. LURMAN and another,
Defendants-in-Error.

Brief for Defendants-in-Error.

On May 9th, 1903, the Governor of the State of New York approved an act (Chapter 661, Laws of 1893) passed by the Legislature of the State of New York and which thereupon took immediate effect, being Chapter 25 of the General Laws of the State of New York and known as "The Public Health Law."

Article III, Section 40 thereof provides that the term food when used in that act

"shall include every article of food and every beverage used by man and all confectionery;"

And Section 41 provides that:

"No person shall within the State * * * * * * have, sell, or offer for sale any adulter-

ated food or drug. An article shall be deemed to be adulterated within the meaning of this act * * * B. In the case of food * * * 6. If it be colored or coated * * or powdered whereby damage is concealed * * * ,,

In this suit, the plaintiffs-in-error, who were the plaintiffs below, seek to reverse a judgment; entered in the Supreme Court of the State of New York on a remittitur from the Court of Appeals of that State affirming a judgment of the Appellate Division of the Supreme Court (First Department) of the State of New York which affirmed a judgment entered on a verdict in favor of the defendants rendered at a Trial Term of the Supreme Court; on the sole ground that the statute quoted is unconstitutional as being in conflict with or repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States, and to the Act of Congress, Laws of 1890, Chapter 839.

The Facts.

The action was brought by the plaintiffs-in-error in the Supreme Court of the State of New York to recover damages alleged to have been sustained by the defendant's refusal to accept certain coffees tendered to them by the plaintiffs-in-error on or about August 14, 1894, under an executory contract made July 17, 1894.

The plaintiffs-in-error conceded from the outset that a large portion of the coffee was in fact colored, coated and powdered with a yellow substance which the testimony shows to have been some form of and in the general nature of that chemical known as "oxide of iron" (foot of page 23 and pages 42 and 43).

It was not claimed that this improved the taste or added to the value of the coffee.

The jury found that this coloring, coating and

powdering did in fact conceal damage present in the coffee.

It is submitted that:

I.

Chapter 661, of the Laws of 1893, of the State of New York, is not repugnant to Article 1, Section 8, Clause 3, of the Constitution of the United States, nor to the Act of Congress, Laws of 1890, Chapter 839.

(*a*) It certainly is not repugnant to either the constitutional provision or the Act of Congress in the aspect of its application to an article of food produced, intended for sale and intended for consumption within the State of New York.

(*b*) Equally is it not repugnant to either the constitutional provision or the Act of Congress in the aspect of its application to an article of food brought from a foreign country or other State into the State of New York and intended for sale and consumption therein.

(*c*) It is in any aspect of its possible application a valid exercise of the police power of the State of New York.

(*d*) The defendants in error were properly allowed to rely upon it for their defence to this action.

(*e*) It was not error to apply it so as to prohibit the sale within the State of New York of an article of food which is an article of interstate and foreign commerce, and which was in this instance imported from a foreign country.

(*f*) It was not error to exclude evidence offered for the purpose of showing an established interstate and foreign trade or commerce to exist in an article of food adulterated within the meaning of its provisions.

II.

The line of demarcation between the reserved police powers of the State in relation to inspecting and prohibiting dealings in that which would be injurious to the public health or morals, or was designed to cheat or defraud, and those matters which fall within the regulation of commerce with foreign countries and between the States is clear and has been defined by this Court on several occasions.

In Bowman vs. Chicago & Northwestern Railway Co., 125 U. S., 465, the Court held the Iowa law forbidding the bringing into that State of intoxicating liquors without having first obtained a certificate that the consignee was authorized to sell such intoxicating liquors within the particular county repugnant to the constitution of the United States on the ground that it was not an inspection law or a sanitary or quarantine regulation, nor a legitimate exercise of police power by the State, and in its opinion pointed out clearly the distinction which applies here.

For it is to be noted that these coffees were, in the condition in which they were tendered to the defendants in error, clearly within the phrase used in the Court's opinion where it speaks of

> "provisions that are ***decayed or otherwise from their condition and quality unfit for human use or consumption."

The distinction is by no means a narrow one, but is broad and comprehensive. A State can under its reserved police powers pass an inspection law —and a public health law is clearly within the definition of an inspection law—which shall prevent dealings within that State in articles which are (to quote again from the same opinion)

> "not merchantable,"

and which

> "are not legitimate subjects of trade and commerce".

As the Court says:

> "They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self protecting power of each state, therefore, may be rightfully exerted against their introduction and such exercise of power cannot be considered regulations of commerce prohibited by the Constitution."

Or as the Court, quoting the language of Mr. Justice CATRON in the License Cases, continuing, says:

> "The assumption is that the police power was not touched by the Constitution, but left to the States as the Constitution found it. This is admitted and whenever a thing from character or condition is of a description to be regulated by that power in a State, then the regulation may be made by the State and Congress cannot interfere. But this must always depend upon facts subject to legal ascertainment, so that the injured may have redress, and the fact must find its support in this; whether the prohibited article belongs to and is subject to be regulated as a part of foreign commerce or of commerce among the States. If from its nature it does not belong to commerce, or if its condition from putrescence or

other cause is such when it is about to enter the State that it no longer belongs to commerce, or in other words is not a commercial article, then the State power may exclude its introduction. And as an incident to this power a State may use means *to ascertain the fact.* And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this Court in the cases of Gibbons vs. Ogden, Brown vs. Maryland and New York vs. Miln."

So also in Schollenberger vs. Pennsylvania, 171 U. S., 1, where the distinction sharply arose in relation to oleomargerine. In that instance the state statute was held invalid in so far as it wholly prohibited the introduction of oleomargerine from another State and its sale in the original package, leaving, however, untouched those aspects of such a statute which may be said to correspond with the scope of the statute under consideration in this case.

The substance of the opinion in that case is that a State cannot refuse to permit the introduction of the pure and unadulterated article within its borders merely because it chooses to decide or assume that that is the only method of preventing the importation of the article in an impure or adulterated condition.

The cases showing the distinction which is contended for by the defendants-in-error are so fully abstracted in the opinions in Bowman v. Chicago & Northwestern Railway Co. and Schollenberger vs. Pennsylvania, and also, the distinction and its application to the present case is so well

covered in the opinion of Mr. Justice Haight in the Court of Appeals of the State of New York in this case (Printed Record, pages 163–167) that little more need be said on this point. Though it may be added that the expressions of Mr. Justice Harlan in delivering the opinion of this Court in Plumley vs. Massachusetts, 155 U. S., 461, apply with accuracy to the actual point here involved.

> "Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such a manner as to induce the mass of the people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand recognition of the right to practice a deception upon the people in the sale of any articles, *even those that may have become the subject of trade in different parts of the country?*"

III.

The contention of the defendants-in-error that because the importation of adulterated foods is a proper subject of regulation, and because Congress in Chapter 839 of the Laws of 1890, itself prohibited the importation into the United States of any "adulterated or unwholesome food * * * mixed in with any * * * noxious chemical," that therefore, that legislation was exclusive and that nothing else than that which fell within that definition could be the subject of an inspection law by a state, is, it is submitted, neither sound as a general proposition nor applicable, in fact, here.

It may be safely, for example, assumed that a yellow oxide of iron is a noxious chemical, at least sufficiently so to

prevent its being either a desirable adjunct to coffee or its having been intended to be affirmatively permitted by Congress as an adulterant for coffee. Neither, it will be observed, does the statute of the State of New York now under discussion nor does the Court of Appeals of New York in construing that statute attempt to change the definition given by Congress as to what constitutes adulteration.

The Act of Congress speaks of mixing in a noxious chemical with a food: that is, it refers to a physical combination of the chemical with the food product, and the coating and coloring of coffee with the oxide of iron in this case was a physical mixing of the two substances together until the food product became coated with the chemical.

As to the exact extent to which a particular chemical must be deleterious to health before it is to be considered as falling within the animadversion of the Act of Congress, the expressions of Mr. Justice FINCH in People vs. Girard, 145, N. Y. 105, become pertinent,

> "Any tampering with food products which adds ingredients not natural or essential is wrought with danger to the public health, or at least involves the intent and result of a fraud upon the community. Food should be pure, absolutely and unquestionably pure. No tricks should be played with it. The legislature may resolutely protect it.
>
> No artificial coloring can ever be added to distilled vinegar for any good and honest purpose that I can imagine. * * * Must the legislature wait for the experiment and until some number of people are made sick or die of it? In so serious a matter as the absolute purity of food, we ought not to say that a general law which compels that absolute purity is beyond the power of the legislature?
>
> There is talk here of interference with the

vested rights of the individual. Sometimes it is pertinent and weighty, but in this case it is neither. It becomes the assertion of a vested right to color a food product so as to conceal or disguise its true and natural appearance; in plain words, a vested right to deceive the public."

The contention that the language of Chief Justice FULLER in Leisy vs Hardin, 135 U. S., 100, 125, which is quoted on the brief of the plaintiffs-in-error, is applicable here is, it is submitted, not justified. The language clearly recognizes a distinction between various kinds of "articles," and clearly intends that an "article" which Congress deems to be a subject of commerce shall not be excluded. But the entire scope of all the decisions is that even where Congress has by specific enactment undertaken to regulate or incidentally to approve dealings in a particular article (as for example, oleomargarine), the states can, nevertheless, under their reserved police power, inspect such article, and if the inspection law be clearly passed in good faith and not as a device to prevent or prohibit commerce in the article, can; if they find the "article" in an improper or fraudulent condition or deleterious to health and therefore to be no longer an article of commerce, prohibit dealings in it.

This is specifically recognized in the very quotation referred to, which says, that articles which Congress recognizes as subjects of interstate commerce cannot be declared by the Court not to be such or be controlled by state laws amounting to regulations,

"*while they retain that character.*"

It will be noted, moreover, that in 1894 the Inspection Law of the United States, Chapter 839 of the Laws of 1890, was, at least so far as this case

is concerned, a farce. No pretense of inspection was made by any government official; no proof of any inspection having taken place under that law is given. The evidence offered is found at page 97 of the printed record. By that it appears that the invoices were stamped in the Custom House:

> "Coffee free, August 16, 1894, J. McC. F. Approved, J. R. F., Dep., Walter H. Bunn, appraiser."

It is apparent, that the only subject with which the United States concerned itself was the collection of duty. The oxide of iron might have been strychnine so far as any effect of the United States Statute was concerned.

It is also to be borne in mind that for the first time, after three trials before a jury, three appeals to the Appellate Division of the Supreme Court, and one appeal to the Court of Appeals, the suggestion is now made by the plaintiffs-in-error that this was "a contract between citizens of the State of New York as sellers and citizens of another State (to wit: Maryland) as buyers."

This suggestion has no place in this case.

The contract was entered into in the State of New York; it was to be performed in the State of New York; the tender of the goods took place in the State of New York.

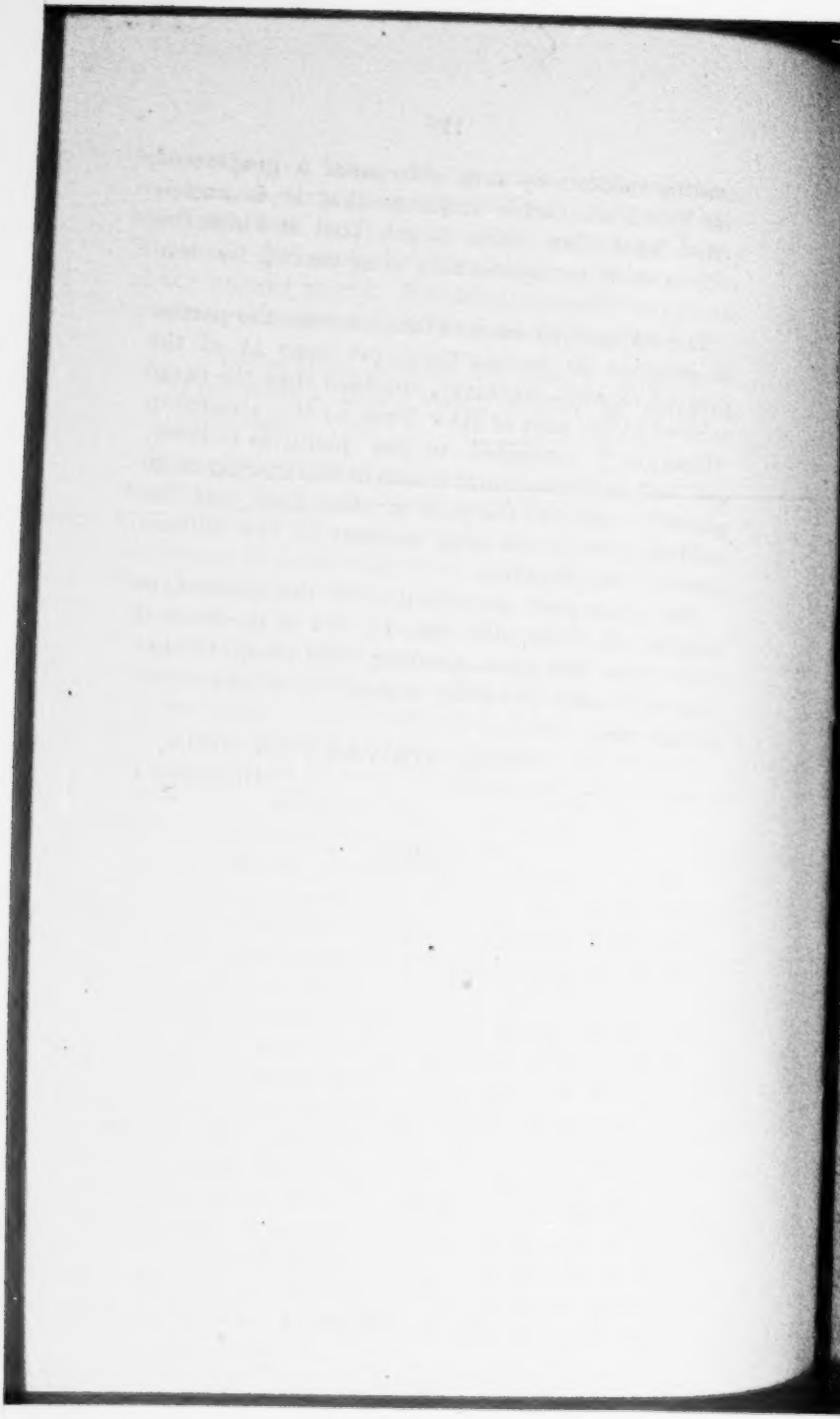
The idea or suggestion that the goods were to be shipped to Maryland is negatived by every fact in the case. The contract itself (printed record, page 14) specifies the steamer by which the goods were to be shipped, and it being within the common knowledge of both the parties that that was a New York steamer, the contract does not mention any port of arrival; but it does specify (page 15 printed record) that the bill is to date "when coffee is all in store;" and the provisions of the contract for

grading indicate by their references to graders of the New York Coffee Exchange that it is anticipated that New York is the port at which the coffees were to arrive, and after arrival be tendered.

The stipulation entered into between the parties in relation to certain facts (at page 12 of the printed record), moreover, specified that the cargo arrived at the port of New York on the steamship "Catania," consigned to the plaintiffs in error, and was in the ordinary course of discharging cargo placed in store at the port of New York, and immediately tendered as an entirety to the defendants by the plaintiffs.

The attempted introduction of the element, or suggestion of the idea, that the law of the State of New York was here operating upon goods in anywise in transit is wholly unjustified by any aspect of the case.

CHAS. STEWART DAVISON,
Of Counsel.



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JAMES H. MCKENNEY,
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Supreme Court of the United States

OCTOBER TERM, 1903.

No. 117.

GEORGE W. CROSSMAN AND ANOTHER,
Plaintiffs-in-Error,

against

THEODOR G. LURMAN AND ANOTHER,
Defendants-in-Error.

ARGUMENT FOR DEFENDANTS-IN-ERROR.

CHARLES STEWART DAVISON,
Of Counsel.

No. 18,648.

APPEAL PRINTING CO., 24 Vesey St. TEL. 192 CORTLANDT.

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Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 117.

GEORGE W. CROSSMAN and another,
Plaintiffs-in-Error,

against

THEODOR G. LURMAN and another,
Defendants-in-Error.

Argument for Defendants-in-Error.

If the Court please there is one preliminary matter in relation to this case as it has been presented to this Court by the learned counsel for the plaintiffs-in-error which I desire to refer to briefly before passing on to what I estimate to be the points of law involved therein, and that is, that now for the first time, after three trials before juries in the Supreme Court of the State of New York, three appeals to the Appellate Division of that Court and one appeal to the Court of Appeals of that State, now for the first time is any suggestion made that a diversity of citizenship existed between the sellers and the buyers, and the suggestion or inference is attempted to be made or drawn that in some wise or in some aspect this case bears upon or relates to goods in transit or to commerce between

the States or to commerce between a foreign country and some State other than New York.

The cause has no such aspect; was never tried on any such basis. No suggestion of the possibility of such an aspect being applicable to the case was ever made, nor do the facts in any wise tend to support any such assumption.

The learned counsel for the plaintiffs-in-error calls attention to the fact that the defendants-in-error resided and carried on business in the State of Maryland, at page 2, sub-paragraph 2 of his brief. At page 11, paragraph 6, sub-paragraph 1, he states that his first proposition is that it has been in this case sought to affect by the New York statute a contract between citizens of different States.

On page 12 of his brief, paragraph 2, it is suggested that the coffees in question were imported for the purpose of being resold in the South and Southwestern States.

In paragraph 3 on the same page he suggests that the plaintiffs-in-error were not allowed to show that there was an established trade in adulterated coffees in other of the United States than the State of New York, and that the statute therefore should not have been made to apply to deliveries to non-residents of the State of New York.

On page 14 of his brief, paragraph 4, the learned counsel suggests that the place where the contract was PRESUMABLY accepted was the State of Maryland.

In paragraph 5 on the same page the suggestion is again made that the goods were for delivery to residents of an entirely different jurisdiction; and a great part of the learned counsel's brief is devoted to showing that a distinction is to be made in this case because of that suggested state of facts.

It will be noted, for example, that on page 19 of his brief, sub-paragraph 3, it is again stated that

the contract was PRESUMABLY accepted by the defendants in Maryland; and so an attempt to give an extraterritorial aspect to the case so far as the State of New York is concerned is made with a view to showing that the State of New York could not concern itself with the adulterated condition of these coffees for the reason that the State of New York cannot be presumed to have the power to pass any inspection law except where its operation would tend to protect the health, safety or rights of its own citizens.

It would seem, however, that if the State of New York can wholly exclude from the State under its inspection laws adulterated food products, that it can also prevent as well a sale of such adulterated food within the State after it may have found surreptitious admission as also prevent the enforcement of such a sale in its courts.

But, as I have already said, all this is not only an after-thought on the part of the plaintiffs-in-error, but it is not sustained by the facts. Had such an issue been urged at any previous time, the evidence could and would have been clear and explicit in the record to the contrary. It is only the absence of the suggestion from the case that has now given opportunity to advance the claim. As it is, however, sufficient does appear in the record to show the error of the suggestion that the case bears any such aspect.

If your Honors will refer to the printed record at page 4, where the plaintiff's complaint appears, you will note that it is alleged in the second paragraph that the contract was an agreement on behalf of the plaintiffs "to sell and deliver to the defendants certain coffee to be shipped at Rio de Janeiro *for New York* by the Steamship Catania." It is alleged in the complaint that the coffee was to grade in accordance with the standard of the Coffee Exchange *of the City of New York*, and its price was

to be based on such grading. It is also alleged in the complaint *"that pursuant to the said contract the said coffee was to be delivered to the said defendants* IN STORE AT THE PORT OF NEW YORK." That the terms of payment for the coffee were that the bill was *"to date when coffee is all in store."*

It is also alleged in the complaint (on page 5 of the printed record) that the coffee was to be graded by Messrs. Mackey & Small, who are a firm of *New York coffee* graders, and if the grading was unsatisfactory a licensed grader of the Coffee Exchange of the *City of New York* was to pass upon the matter.

It is then alleged in paragraph 3 of the complaint that the coffee did arrive *at the port of New York* upon the steamship. That it was duly placed in store at the port of New York *"and was thereupon tendered and offered to said defendants."*

It is then alleged that it was graded by these New York graders or coffee brokers. That afterwards the grading being unsatisfactory a licensed grader of the New York Coffee Exchange graded the coffee.

And finally in paragraph 6 of the complaint (page 6 of the printed record) it is alleged that thereafter *"the said coffee was duly sold at public auction in the City of New York by the plaintiffs for and on account of the defendants."*

The defendants-in-error, therefore, respectfully urge upon the Court's attention that with such allegations in the complaint, and with the additional fact, as is well known to the plaintiffs-in-error, that the defendants-in-error, while they resided in the City of Baltimore and conducted business there, also conducted a large part of their coffee business in the City of New York, and this for the good reason that the City of New York is the great coffee

mart of the United States, it is, as I have said, respectfully urged upon the Court that it is too late now by suggestion to try to give the cause an aspect which it does not in fact bear. There was no idea on the part of any party to this contract, nor any suggestion, that the coffee was sold for any special purpose or for any transportation to the south or southwest. No such intent in fact, though intent is wholly immaterial, actuated the defendants-in-error in buying. The contract was a New York contract, made in New York, to be executed in New York and the goods were in no wise in transit. They reached their destination, the port of New York; went into store at the port of New York; delivery was tendered of the goods in store at the port of New York; and the sole fact on which this, as one might say, figment of the imagination is based, is the fact that the defendants-in-error lived in Baltimore.

The claim on the part of the plaintiffs-in-error that the coffees were imported for the purpose of being resold (presumably by the defendants-in-error) in the Southern and Southwestern States, and that they would have shown this by the excluded evidence is, it is submitted immaterial. The attempt in this case is to enforce a delivery attempted to be made in the State of New York. Moreover, the excluded evidence was not in fact offered with any such idea on the part of the plaintiffs-in-error. Nor was any such possible bearing of the evidence called to the Court's attention.

When the offers of parts of the testimony taken on previous trials were made by counsel for the plaintiffs (see foot of page 81 of the Printed Record) the counsel was asked from abundant caution whether he claimed that it had reference to any different question from that which had been presented to the Court; to which he replied that he offered the

testimony as bearing upon the issues in the case, making no suggestion of the taking of any such position as is now suggested. Had any such position been taken it could have been then and there refuted to the fullest extent; but it was not made nor was it within the issues of the case as presented by the pleadings as framed by the plaintiffs' own verified complaint and the answer.

Moreover, it will be noted that no such ground was taken in the counsel's motion to direct a verdict for the plaintiffs. The third ground (Printed Record, foot of page 83) is the only ground which has to do with the statute, and there is no suggestion therein that the goods were in transit or that it was a contract to be performed elsewhere than the plaintiffs-in-error on oath in their complaint had alleged that it was to be performed, that is in the City of New York.

There is one other matter, though of but a trifling nature, to which I desire to call attention at the outset. There is a suggestion in the plaintiff's brief that the falling of the coffee market was what led to the defendants' rejection of the adulterated coffee; but the Court will note that there is something more in this case than that.

The action is brought to recover a trifling sum, $1,300, (the damages which the plaintiffs claim they suffered), and yet each side has expended upon its prosecution and defense respectively several times the total amount involved. And it would surely be extraordinary if a reputable business house, and I think the plaintiffs-in-error have never claimed that the defendants-in-error were not such, were willing to be suspended from the Coffee Exchange of the State of New York for a year, as they were, as appears in the Record, for their refusal to accept adulterated goods, be re-instated by the Courts on the ground that such suspension was un-

lawful and go to the expense and annoyance of nine years of constant litigation for the mere purpose of avoiding a trifling loss on a slightly differing market, although it may be said that there is in the Printed Record no evidence sufficient to sustain the proposition that there was a falling market or that the defendants-in-error must necessarily suffer *a loss on this coffee, assuming it not to have* been adulterated, had they accepted it.

I shall, therefore, venture to assume that this was a New York contract for the delivery in New York of certain coffee in a raw and natural state, and in that connection I venture to ask the Court's attention to a phrase in the contract (page 14, foot of page). which, omitting the immaterial, reads:

> "sold five hundred bags Rio coffee (sound and made sound portion) to be shipped at Rio de Janerio by steamer Catania."

Your Honors will note that the contract provides that the coffee shall be sound, and that if it be found not to be sound, that it shall be made so; and it is to be noted that it appears by the exhibits in the case that the defendants in error attempted to avail themselves of this stipulation in the contract for their protection (see page 98 of Printed Record, Plaintiff's Ex. JJ.).

In that letter from the defendants to the plaintiffs they call attention to the fact that while they must decline to accept the coffee tendered as No. 9 coffee, they await *the plaintiffs substitution of other lots;* of coffee therefore, and in plaintiffs' Exhibit KK, a further letter from the defendants to the plaintiffs, they call attention on the 15th of August, the same day, to the fact that the coffee tendered for 9s is colored and damaged and add:

"Please substitute other coffee."

saying

"We bought the coffee in good faith and we feel quite sure that you will correct the mistake."

We have then a contract to deliver at the Port of New York, five hundred bags of sound, raw Rio coffee. We have a tender of that coffee in store at the Port of New York, a refusal to accept it so far as it was adulterated, on the ground of its adulteration. We have a sale of that coffee in the City of New York, at auction to establish the measure of damages. We have an action brought in the State of New York for the purpose of recovering the difference between the amount realized at auction and the amount called for by the contract, and a defense that the goods were adulterated and obnoxious to the Statute of the State. We have the cause sent to the jury on the single issue of the adulteration or non-adulteration of the coffee. That is, the Trial Judge charged the jury (see page 87 of the Printed Record, toward the end of the page).

> "Perhaps the Court should say to you that it is not the mere coloring of coffee which infringes upon the Statute and *that you must remember*, but it is the coloring of the coffee which produces the effects as facts specified in the Statute, that is, concealing damage, enhancing value, etc."

The Court having previously (page 85 near the end of folio 120) charging the jury as to the issue in the case, said:

> "It is a very simple one. Was the merchandise so colored etc., as to conceal damage or make it appear better than it really was or of greater value?"

And at the request of the plaintiffs (page 91 of the Printed Record) the Court charged the jury that the only question which the jury had to consider was whether the coffee was adulterated with-

in the meaning of the public health law of New York.

And he also charged the jury (page 91, folio 131):

> "that the mere fact that an artificial coloring matter was placed on the coffee does not constitute adulteration and that the jury were not to consider any intent or purpose with which any coloring matter was placed upon the coffee."

That is by their verdict the jury found that the coffee had in fact been colored, coated and powdered over so that damage was concealed: that is, its damaged condition was no longer apparent to the eye, and it was thereby made to appear better than it was, or of greater value.

Now, if the Court please, as to what this coloring matter which was placed upon the coffee was, there can be no question. The defendants called and examined the plaintiffs' own expert chemist who had testified on behalf of the plaintiffs on previous trials (page 22 of Printed Record). He said that he found on the coffee

> "some form of iron: that is, a chemical substance in certain quantities opaque. It was a dense substance of a reddish color."

He said (at the foot of page 23):

"That it was presumably oxide of iron."

The defendants also examined another chemist, Mr. Lehman (page 40 of the Printed Record). He said that he also had analyzed some of the coffee, and that he found it covered with a dense opaque coloring like yellow ochre; that it was a basic ferric salt containing all the elements of yellow ochre. He showed a bottle of yellow ochre and said that that corresponded to the substance he got off the coffee beans; that he had anayzed some of the con-

tents of the bottle and that it contained the same substance as that removed from the coffee beans.

He says (page 41 of Printed Record), that he analyzed some natural coffee not discolored by any yellow substance and that he did not find any yellow ochre in the analysis of the natural coffee. He says (at foot of page 42) that he would call it an oxide of iron, or that a basic ferric salt was the more accurate name. He also says that the substance was opaque and the general testimony in the case shows that the coffee was covered up with this yellow substance, so that the damage in the coffee was not discernible: and the jury so found.

Substantially, these then are the material facts, and the case, it is respectfully submitted, reduces itself to an inquiry before this Court as to the constitutionality of the Statute of the State of New York.

The State statute is Chapter 25 of the General Laws of the State of New York; the Public Health Law of that State. It is a lengthy statute and was passed as Chapter 661 of the Laws of 1893 and contains some two hundred and ten sections covering the entire ground of State and local Boards of Health, of adulterations, of tuberculosis and glanders, of potable waters, quarantine and health officers, practice of medicine and dentistry, of pharmacy and contains various other provisions.

Article III of that statute deals with adulterations and consists of ten sections. So far as is material here the statute reads (excluding all immaterial matter) as follows:

> "The term food when used herein includes every article of food and every beverage used by man.
>
> No person shall within the State have, sell or offer for sale any adulterated food. An

article shall be deemed to be adulterated within the meaning of this Act in the case of food if it be colored or coated or powdered whereby damage is concealed."

The statute covers the case of the admixture of any ingredient which may render such article injurious to the health of the person consuming it; and the case of the mixing with the food of any substance so as to injuriously affect its quality.

I think it will be on all hands conceded that this general law of the State of New York is not in any wise or aspect an act passed in bad faith with the intent or for the purpose of indirectly effecting some other result than that which is apparent upon its face.

The many attacks which have been made before this Court on State statutes which have attempted to interfere with commerce with foreign nations or between the States under the guise of being an exercise of the police power of the particular State find no parallel here. Indeed, no such suggestion is made. Assuming this to be so, that the statute contemplates only proper objects then under the decisions of this Court this statute would stand as a valid exercise of the police power of the State in the nature perhaps of an inspection law, and permitting the State authorities under it at any time to lawfully exclude from the State or confiscate any article of food obnoxious to its provisions.

This has been so often and so clearly held by this Court and the line of distinction between what are the police powers of a State and what are matters which fall within the regulation of commerce with foreign countries and between the States has been so often considered and so clearly announced by this Court that I feel that it would be to in-

fringe upon the Court's time to go into any discussion in detail of that matter.

On the brief, the attention of the Court has been directed to the cases of

Bowman vs. The Chicago & Northwestern R. R. Co.

Schollenberger vs. Pennsylvania, and *Plumley vs. Massachusetts.*

And to those cases which are analyzed and commented upon in the opinions therein.

The attention of the Court has also been respectfully requested for the opinion in this case itself at the Court of Appeals by Mr. Justice Haight, which will be found in the printed record at pages 163 and 167, and also will be found reported in 171 N. Y., at page 329.

We estimate the distinction to be that where an article is an article of commerce the State cannot exclude it by what device soever. That where an article, however, is by inherent character or has become by reason of damage, using the phrase in its largest sense or by reason of noxious adulteration, no longer an article of commerce, the State can rigorously protect itself against it in accordance with its own best judgment.

If and unless then one is prepared to say that the coating of coffee with a noxious chemical, in this case a basic ferric salt known as oxide of iron and popularly termed yellow ochre, with the resultant effect of concealing damage which actually exists in the coffee, is not to so change the character of natural coffees as to make it reasonable that it should be deemed adulterated and obnoxious—unless one is prepared to say that a provision excluding such a substance is wholly unreasonable and a mere device to hamper and restrain commerce we submit that the pro-

visions of a statute providing for the exclusion of an article of such changed character will be found by this Court to fall within the proper scope and purview of such a statute as is here in question.

One further suggestion is made by the plaintiffs-in-error, that is that because Congress at that time had itself enacted a law aimed at just such adulterated foods as these coffees, therefore this statute became unconstitutional.

It seems sufficient to say that in relation to the police powers of the State, in relation to their inspection laws (their public health laws to put it generally), the rights reserved do not fall within that class of matters as to which when Congress legislates, the State's right ceases.

But even if it did, in view of the fact that the Act of Congress known as Chapter 839 of the Laws of 1890, itself condemns just such adulterated foods as are concerned in this case, it would be but an absurd result to say that the cause should be reversed because the State Court applied the State statute when it would have been sustained had the State Court availed itself of the Act of Congress.

It may be argued that the Act of Congress provided for the confiscation of articles which are in fact obnoxious to its terms and for no other penalty or result. But it seems clearly to follow that if the State statute merely helps out the Act of Congress and provides that that shall not be dealt in which Congress says shall be confiscated, the State statute is neither repugnant to the terms of the Act of Congress nor unconstitutional.

The plaintiffs-in-error seem to think that there is some substantial or legal difference between the phrase an adulterated or unwholesome food; adulterated or mixed in with any poisonous or noxious chemical drug or other ingredient injurious to

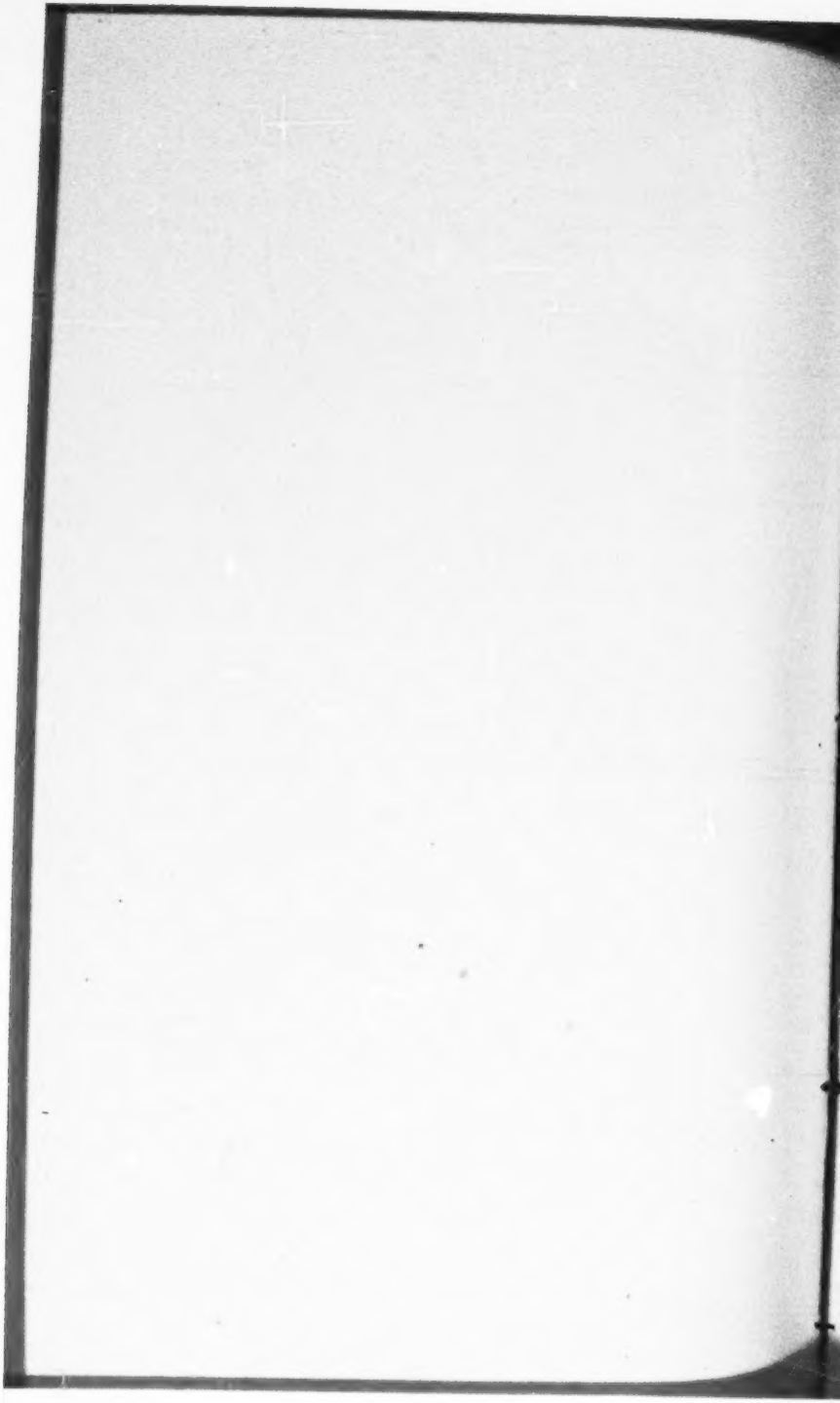
health; and the facts of this case, that is raw coffee so covered with a coating with yellow ochre, which is a noxious chemical, as that its damaged condition is concealed.

But how was this coffee coated with this yellow ochre except by the yellow ochre being physically mixed in with it, and why is not yellow ochre a noxious chemical within the meaning of the Act of Congress? The Act of Congress carefully specifies both "poisonous" and "noxious" chemicals. Recognizing that there are chemicals which are not such active poisons as to fully fall within the scope of the term "poisonous," it adds the term "noxious." That is, unwholesome, injurious, insalubrious, as the dictionaries define it. The word is the equivalent or a synonym for "noisome," which is defined as noxious to health, hurtful, mischievous; unwholesome, offensive to the smell or other senses; and as the Court of Appeals says in its opinion, there is no claim here that the addition of this yellow ochre improved the taste or added to the value of the coffee; and as to make such a claim would in itself be ridiculous, and whereas it is moreover matter of common knowledge that yellow ochre is not a deadly poison, but is distinctly unwholesome, it would seem as though so far at least as this case is concerned, there was no repugnance, but a close correspondence between the State statute and the then existing statute of the United States against adulterations.

That this matter of adulterating food has grown to proportions which have called for more careful attention than the former statute of the United States was a dead letter and not enforced, that just such provisions as those of the statute of the State of New York are desirable and requisite for the protection of the entire United States, is so far to-day matter of common knowledge that I need but

remind the Court of the recent legislation and of the activity of the United States to-day in excluding from our borders the adulterated wines and foods of all description which are attempted to be foisted on the people of the United States by unscrupulous foreign dealers.

CHAS. STEWART DAVISON,
Of Counsel.



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Supreme Court of the United States

No. 18,648
OCTOBER TERM, 1903
No. 117

GEORGE W. CROSSMAN AND ANOTHER
Plaintiffs

against

THEODORE G. LURMAN AND ANOTHER
Defendants

REPLY BRIEF FOR DEFENDANTS IN ERROR

CHARLES STEWART DAVISON
Of Counsel

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Supreme Court of the United States.

No. 18,648.

OCTOBER TERM, 1908.

No. 117.

GEORGE W. CROSSMAN and another,
Plaintiffs,

AGAINST

THEODOR G. LURMAN and another,
Defendants.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

The defendants-in-error respectfully request permission to submit the following additional memorandum to the Court relating to certain points raised by the Court during the argument and to the supplemental brief which has been submitted by the plaintiffs-in-error.

I.

The defendants-in-error did not concede by their answer nor have they at any time conceded that the goods were "as called for by the contract." On the contrary, they specifically deny this and did so deny in their answer (Printed Record, p. 8, fol. 11):

> "THIRD.—They admit that on or about the 18th day of August, 1894, the steamship *Catania* arrived at the Port of New York, having on board a large amount of coffee, *but they deny each and every allegation other than the arrival of said steamship* contained in paragraph three of the said complaint, and on the contrary they allege * * * that on examination the said samples were found to embrace samples of coffees which had been colored, coated, polished and powdered, *whereby damage was concealed, and they were made to appear better than they really were, and of greater value*, in contravention, etc."

Also (in the same folio) by a separate paragraph of their answer, they deny this point as to which it is now erroneously claimed there was or is such a concession (Record, p. 8, fol. 11):

> "FOURTH.—They deny that the plaintiff's have complied with the conditions of said contract upon them imposed."

Again, by their answer, they affirmatively allege that no coffees such as were contracted to be purchased by them were ever, in fact, tendered to them (Printed Record, p. 8, fol. 12):

> "And they allege that the said plaintiffs have failed and neglected and refused to comply with the terms of said contract on their, the said plaintiff's, part to be done and performed."

The Court should note that the confusion which the plaintiffs have attempted to introduce into this case is a mere "confusion of terms."

The plaintiffs constantly claim that "grades" of coffee are some mysterious and intricate thing which can alone be understood or comprehended by "experts."

The plaintiffs constantly claim that if "graders" have "graded" the substance that that makes it "coffee." Under such a claim it might be in fact oats or wheat or wooden shoe pegs or wooden nutmegs, but it officially becomes "*Coffee grade 9.*"

If the question arises how graders came to grade this artifically colored and damaged stuff as coffee and how they came to find it to be "approximately grade 9" of the New York Coffee Exchange, it is explained at once by referring to the printed record.

At page 69 of the printed record Mr. Schilling, the ultimate "grader" of the coffee (the so-called "arbitrator of grades"), who was called as a witness by the plaintiffs, testified under cross-examination:

1. That he had not seen this coffee *before* it was coated or powdered.

2. That he did not wash any of it.

3. That he did not take a rag or anything else and rub any of the coloring matter off so as to see what he could see after removing the coloring matter.

4. That he did not do anything in the way of removing any of the yellowish substance for the purpose of seeing what appearance in fact the coffee would have after the removal of the yellow ochre.

5. That the super-imposition of the yellowish matter did make the whole of the coffee of a general yellowish appearance to a certain extent.

That is, he "graded" this coffee in its artificially colored condition (and he was the "grade arbitrator" concerning whom the plaintiffs advance such extensive claims). His opinion that he could grade it just as well whether it were artificially colored or not may be genuine, difficult as it is to believe such an assumption; but since the grade of coffee depends upon its (*natural*) color (that is, since poor coffees are more diversified in color than good coffees which are more uniform in color, though some are dark and some are light); and as he also testified (a few lines below) that it was a fact that the addition of this coloring made the coffee appear a different color from the natural color that particular sample would have been, it is charitable to assume that he gave it a higher grade (that is, brought it technically within "grade 9") than he would have given it had he ever actually seen the coffee itself. If this charitable assumption be not indulged in, we have swearing that he could judge *natural* coloration though an opaque medium (yellow ochre).

As for the original graders, one of them, Mr. Small (the plaintiffs' grader) was also called as a witness by the plaintiffs, and under cross-examination he testified (Printed Record, p. 77, fol. 109) that the coffee was colored, the beans being more or less entirely covered up, and that it had been done with some completeness of process.

He said (and it must be borne in mind that he was one of the graders) that *it was very hard for him to tell whether all of the beans were covered or not.*

It also seems that Mr. Small was a person who had been disciplined and suspended from the Coffee Exchange for putting too high grades as a grader on coffee.

He claimed that, having washed this coffee, he found much better coffee than he thought it was before he washed the coloring matter off it. Whereupon he was shown two glass bottles of coffee from

which he poured the contents into pans (they were Exhibit No. 10 and Exhibit No. 4), and he said that Exhibit 4 was the better coffee; and Exhibit 4 was the *artificially colored Catania coffee unwashed;* while Exhibit 10 was a bottle of the same adulterated stuff *with the adulteration washed off.* Further comment on the "graders" and the class of testimony they gave seems unnecessary.

II.

The defendants claim and have always claimed that they contracted for five hundred bags of NATURAL coffee and that the adulterated coffee, being covered up and coated over with yellow ochre; so that damage was concealed and it looked to be better than it really was and appeared to be of greater value; was not what they had contracted for.

The Court will remember that the plaintiffs' counsel on the argument violently protested against the idea that the defendants were entitled to receive *natural* coffee under the contract.

This view could only be sustained on the assumption that the contract does not *specify* that it was to be "*natural coffee*"! Whoever heard of a mercantile contract that provided affirmatively that adulterated goods were not to be tendered under it!!

The contract provides for the sale and purchase of five hundred bags of Rio coffee, which are by the vendors warranted "*sound and made sound portion.*" That is, if any of the coffee which is tendered is unsound, the plaintiffs agree to substitute sound coffee therefor. Surely coffee coated with yellow ochre so that it looks better than it really is and of greater value, and its damaged condition is thereby concealed, does not comply with the definition of "sound coffee."

Under these circumstances is it too violent an assumption to suppose that the plaintiffs did contract for "*natural coffee*"? But if they contracted for natural coffee and if what they were tendered was not natural coffee, but artificially colored and coated coffee, all questions about "grading" become immaterial.

The allegation of the complaint is (Printed Record, p. 6, middle of fol. 8):

> "That the said plaintiffs have duly complied in all respects with each and every condition of the said contract upon them imposed."

The issue tendered in the answer as to this is; as quoted above; an express denial and again an express allegation to the contrary.

The concession of the plaintiffs that the coffee was artificially colored and coated over with this yellow ochre was sufficient to sustain a direction of a verdict for the defendants without regard to the statute.

The fact that the Court sent it to the jury to find as to a further fact; whether the coffee was obnoxious to law as being adulterated, and that the jury found that this was the fact, would not justify a reversal even had there been no statute or even if the statute were unconstitutional.

III.

The claim on the part of the plaintiffs that they desired to show a trade in the South and Southwest in artificially colored coffees is, in addition to what has been said on this subject in the brief, open to the further objection that if there ever was such a

trade it was surreptitious and unlawful. For example:

The statute of ALABAMA (Code, § 4074—adopted in 1886) provides:

> "Any merchant, grocer or other person who mixes any foreign matter or substance with sugar, syrup * * * or other article of food so as to * * * change the quality thereof, &c., &c., shall be fined, &c."

In TEXAS, by the Penal Code in operation in 1894, it was provided by Article 432:

> "An article shall be deemed adulterated within the meaning of this chapter
> (*b*) in the case of food or drink * * *
> (*f*) if it be colored or coated or polished or powdered, whereby damage is concealed or it is made to appear better than it really is or of greater value."

(The citation given is from an edition of 1895, but this provision was adopted April 10, 1883, *so that the New York statute is simply a copy, eleven years afterwards, of the Texas act*, and yet the plaintiffs claim that the South has been slow to protect itself in this respect.)

In MISSISSIPPI the Code (in the Revised Statutes of 1892) provides, Section 2096:

> "An article of food shall be deemed adulterated * * * (*g*) if it be colored or coated or polished or powdered, whereby damage is concealed or it be made to appear better than it really is or of greater value."

By Section 2095 the term food is made to include every article used as food or drink by man.

In TENNESSEE the Code of 1884 provides, Section 4829 (M and V 5632):

> "It shall be a misdemeanor (2) for any person fraudulently to adulterate for the purpose of sale any substance intended for food or

any wine * * * or other liquor intended for drink."

In LOUISIANA (Revised Statutes, 751), Laws of 1880, Act. 20, p. 23, is found an article to prevent the sale of adulterated food:

> "Sec. 1. That it shall be unlawful for any person or persons to adulterate or sell, or offer to sell, in the State of Louisiana any article of food and sustenance knowing the same to be adulterated."

See also Laws of 1882, Act ~~of 1882~~, page 103, which is an act to define and punish the adulteration of drugs, food and drink, &c., making it a misdemeanor; of which Section 2 provides:

> "An article shall be deemed adulterated within the meaning of this act * * * in the case of food or drink if any substance has been mixed with it so as to lower or injuriously affect its quality or strength or if any inferior or cheaper substance or substances have been substituted wholly or in part for the pure article."

And the same Act provides:

> "Section 3. No person shall manufacture, sell or offer for sale within this State any drug, groceries, such as sugar, *coffee* * * * or any other article to be consumed as food or drink unless the package when sold at wholesale, or the package from which it is taken when sold at retail be stamped in plain large letters showing the true quality and kind of article sold, within the meaning of this Act, etc."

In MISSOURI the Revised Statutes of 1889, Section 3879, provides:

> "Every person who shall fraudulently adulterate for the purpose of sale anything intended for food or drink, or any drug or

medicine, shall be deemed guilty of a misdemeanor."

Sufficient, it would seem, has been cited to show that the trade in adulterated coffees in the South, which the plaintiffs *now say* they so strenuously desired to prove, must have been at best a somewhat precarious one as well as an unlawful one.

IV.

The suggestion was made on the argument by the plaintiffs-in-error that the defendants have silently conceded that the adulterated coffee was not poisonous. They take the position apparently, that food to be "adulterated" must be adulterated with something poisonous, and they claim that there can, therefore, be brought from a foreign country into the State of New York, or from an adjoining State, into the State of New York, an article of food adulterated with something which is non-poisonous, and that trade therein; that is, the attempt to resell such adulterated article; in New York would be protected by the commerce clause of the Constitution of the United States.

As to this, two considerations arise:

FIRST.—Yellow ochre (which is the adulterant here) is an oxide of iron, or technically, a basic ferric salt. The plaintiffs claim that it is to go outside of the record to refer to the dictionary, but it is submitted that the dictionary is always present in every case, and a consultation of the dictionary will show that there is no element in yellow ochre which is salubrious, or which aids directly or indirectly in sustaining life. It is, in fact, a salt of iron with an admixture of silica and

alumina. The plaintiffs-in-error would have us close our eyes to our common knowledge, which is that yellow ochre, while not a deadly poison, is not the best possible thing to take into the human system.

Second — But even assuming that it were wholly innocuous even in large quantities; let us take an example of an absolutely innocuous adulterant and apply the plaintiffs' contention:

Assuming that twenty cans of milk brought from New Jersey across the North River in to the State of New York have been adulterated with water.

It is still milk *in one sense*. The adulterant is innocuous. The mixture is not of itself either poisonous, noxious, or harmful.

Is it beyond the police power of the State to forbid the sale, and is watered milk an article of interstate commerce protected by the Constitution of the United States?

So also many other articles (as cider or vinegar) adulterated with water are clearly "adulterated," although the adulterant is harmless.

Spirits which are below the standard of proof would be another example.

It is submitted that the plaintiffs have overlooked the primary meaning of the word "adulteration." It simply means the "addition of something else," being derived from *ad* and *alter*. To resort again to the Dictionary, to adulterate is defined by Webster as being: to corrupt, debase or make impure with an admixture of baser material. As an adverb, it means debased by foreign material, and the same authority gives as definition for the word as a noun (adulteration) the act of adulterating or the state of being adulterated; corruption or debasement by foreign material.

V.

A careful examination of the Act of Congress (Laws of 1890, Chapter 839) moreover will show that in order that an article of food shall be deemed to be adulterated within its meaning, *it is not necessary that it should be mixed with either a poisonous or a noxious chemical.*

One of the purposes of the act is shown by its title to be the

> "prohibiting the importation of adulterated articles of food or drink."

And it is provided by

> "Section 2: That it shall be unlawful to import into the United States any adulterated or unwholesome food or drug or any spirits or malt liquors adulterated or mixed with any poisonous or noxious chemical, drug or other ingredient injurious to health, &c., &c."

> "Section 3. That any article designed for consumption as human food or drink, and any article of the class or description mentioned in this act which shall be imported into the United States contrary to its provisions shall be forfeited to the United States, and shall be proceeded against, &c."

Rejecting from the language that which does not apply to food, and we have a statute reading as follows:

> "Section 2. That it shall be unlawful to import into the United States any adulterated * * * food. * * *"

This then brings us back to the consideration of the meaning of the word "adulteration," and as has

been shown above, adulteration can as well be by a substance harmless in itself (for example, water), as by a substance more or less noxious (for example, yellow ochre), or by a poisonous substance (for example, strychnine).

VI.

It will be noted that in the supplemental brief for the plaintiffs-in-error, page 2, paragraph 2, the plaintiffs' counsel advance the claim that the case should be sent back if it was "*tried upon the wrong theory*"; but, as stated above, in view of the fact that the contract calls for five hundred bags of sound coffee; that the complaint inferentially alleges they tendered sound coffee; that the answer denies that they tendered sound coffee; that the plaintiffs admit that the coffee was artificially colored (Printed Record, p. 15, beginning of fol. 25).

> "Mr. Kellogg: There is no question but that
> "this coffee had a foreign coloring matter
> "upon it."

that, therefore, a direction of a verdict would have been sustained on these facts alone; it would seem an idle thing, if the cause has been rightly adjudged, to send it back for a new trial in order that a verdict might be directed instead of one received from a jury on the additional point of adulteration.

The Court will note that the action was brought more than nine years ago; that it was three times tried before a jury; three times appealed to the Appellate Division of the Supreme Court; once appealed to the Court of Appeals, and it is submitted that it has been sufficiently litigated.

VII.

That the plaintiffs' claim on the argument that this was an attempt on the part of the defendants to avoid a possible loss of a trifling amount of money ($1,300) is not well founded, nor is the insinuation that they sought to reject goods because of a falling market justified, it is submitted, as will become apparent on considering that which appears in the record.

It appears by the testimony of the plaintiff that there were proceedings taken in the New York Coffee Exchange in relation to these matters, that both the plaintiff and the defendant are members of the New York Coffee Exchange (Printed Record, p. 17, fol. 27); that Mr. Lurman appealed to the various committees; that all his appeals were rejected; that the plaintiffs complained of him to the Coffee Exchange; that they made a charge against him; that he was suspended from the Exchange; that he brought proceedings in court and that he was reinstated by the courts as the result of those proceedings; and if this Court will look at the opinion handed down by the General Term of the Supreme Court, on his reinstatement (Matter of Lurman, 90 Hun, 303), it will see at a glance the position of the Courts of New York, concerning the class of proceedings which were taken against the defendant in the Coffee Exchange, as also the Court's opinion of the good faith in which the defendants have acted.

The Court at page 311 says:

> "That this particular lot had coloring matter upon it is conceded by all who saw the coffee, thus raising at least a fair presumption that the claims advanced by the petitioners were based upon some foundation and was made in apparent good faith. Notwithstanding this the record shows that *the graders and the Exchange were seemingly fearful of the issue and studiously avoided*

even giving a hearing on the merits to the claim advanced,

the Court having already said (p. 309) that

> " the whole machinery of the Exchange, being seemingly brought to support the proposition that it would allow no investigation of an official character upon the question of fact as to whether the coffee tendered to the petitioner for his refusal to receive which he was suspended, was or was not as alleged by him adulterated."

CHAS. STEWART DAVISON,
Of Counsel.

Supreme Court of the United States.

No. 117.—October Term, 1903.

George H. Crossman and Herman Sielcken, composing the Firm of W. H. Crossman & Brother,
vs.
Theodore G. Lurman and Benjamin D. Williams, composing the Firm of Theodore G. Lurman & Company.

In error to the Supreme Court of the State of New York.

[January 11, 1904.]

Mr. Justice White delivered the opinion of the Court.

The law of the State of New York contained the following:

"Sec. 41. Adulterations.—No person shall within the State manufacture, produce, compound, brew, distill, have, sell or offer for sale any adulterated food or drug. An article shall be deemed to be adulterated within the meaning of this act, . . . in case of food, . . . (6) if it be colored or coated, or polished or powdered, whereby damage is concealed, or it is made to appear better than it really is or greater value." (Laws of the State of New York of 1893, ch. 661, section 41, being chapter 25 of the General Laws of the State of New York.)

With these provisions in force, in July, 1894, the firm of Crossman & Brothers, hereafter referred to as the sellers, residents of New York city, by contract made in New York, sold to the firm of Theodore G. Lurman & Company, hereafter referred to as the buyers, residents of Baltimore, five hundred bags of Rio coffee, one-half the bags to be No. 8 grade and the other half No. 9 grade. It was stipulated that the coffee was to be shipped from Rio Janeiro to New York city by a designated steamer, the coffee to be sound or to be made sound by the sellers. The grades 8 and 9 referred to in the memorandum of sale were standard types, bearing those numbers, established by the Coffee Exchange of the city of New York, and it was agreed that the coffee was to be of the average of such types, and differences arising on the subject were to be determined by a "grader," to be selected by each of the parties, the two to select a third in the event of a disagreement, his decision to be conclusive. It was stipulated that on the arrival of the steamer and the storage of the coffee in New York the buyers were to have the advantage of the first month's storage and fire insurance, free of expense.

In due time the named steamer reached the port of New York, and the five hundred bags of coffee were stored and delivery tendered in New York

city to the buyers. Some of the coffee was accepted and the remainder was rejected, on the ground that it was adulterated, because it had been artificially colored by coating the beans with a yellow wash. Without going into the details of what transpired between the parties as a result of the refusal to accept the coffee, it suffices, for this case, to say that ultimately the graders provided for in the contract were named, and on their disagreement a third was selected, who decided that, although the coffee had been coated with the wash, its average quality was yet equal to the specified types of the Coffee Exchange referred to in the contract. The buyers refused to abide by this finding and to accept delivery and pay for the adulterated coffee. The sellers then disposed of the coffee for account of the buyers, and commenced this suit to recover the difference between the amount produced by the alleged sale and the contract price. During the course of the litigation two trials were had, and the cause was twice passed on by the appellate division of the Supreme Court in and for the first judicial department. On the first hearing in the Supreme Court it was held, in accord with a decision of the Court of Appeals of the State of New York, rendered in a collateral controversy which grew out of the the refusal to accept the coffee, (*In re Lurman*, 149 N. Y. 588,) that if the coffee was adulterated, within the statute of the State of New York, the buyers were not bound to accept, despite the finding of the grader that it conformed to the types of the Coffee Exchange, referred to in the contract. Finally, all incidental questions being eliminated, the cause was tried on the distinct issue whether the coffee was adulterated within the provisions of the statute. There was a verdict and judgment for the buyers, which was affirmed by the appellate division of the Supreme Court in and for the first judicial department. The cause having been then taken to the Court of Appeals of the State of New York, the court affirmed the judgment of the Supreme Court and remitted the record to that court. (171 N. Y. 329.) Because of such remittitur this writ of error to the Supreme Court is prosecuted to review the judgment of the Court of Appeals.

Concerning the facts of the case the Court of Appeals said (p. 335):

"The coffee tendered by the plaintiffs, which was rejected, was of a low grade, containing many poor, withered and black beans. It, confessedly, was colored and the beans coated with a yellowish substance. It is not contended that the coloring matter improved the taste or added to the value of the coffee. It is claimed that the only purpose of the coloring was to hide the character of the poor beans and to make them appear of the same character as the good coffee. The jury has found by its verdict that it was so colored as to conceal the damaged portions, or made it to appear better than it really was, or of greater value to the ordinary, untrained observer. In other words, that it was adulterated for the purposes of fraud and deception."

Applying the provisions of the health laws of the State of New York concerning the adulteration of food products already referred to, it was decided that the court below had correctly held that there was no obligation on the part of the buyer to take delivery and pay for the coffee if fraudulently colored in violation of the prohibitions of the statute. Coming to consider the contention of the sellers, that the provision of the law of the State in question was repugnant to the commerce clause of the Constitution of the United States, the Court of Appeals said (p. 332):

"The States have no power to regulate commerce with foreign countries or with each other. This power has been delegated to the Congress of the United States, and that body can, by law, determine what shall or shall not be permitted to be imported. With the right of importation follows the right of sale in original packages, and therefore the States cannot prohibit the sale of articles of commerce within their borders. The States cannot, under the guise of inspection, or under their reserved police powers, prohibit the importation into their jurisdictions of sound meat, under the pretense that it may be damaged or decayed, or Texas cattle for fear they may be diseased, or spirituous or malt liquors for fear they may intoxicate, or oleomargarine for fear it may be adulterated. (*Railroad Co.* v. *Husen*, 95 U. S. 465; *Bowman* v. *C. & N. W. Ry. Co.*, 125 U. S. 465; *Leisy* v. *Harden*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1.)

Having thus fully conceded the plenary operation of the Constitution of the United States upon interstate and foreign commerce, the court proceeded to decide that the statute of the State of New York which it upheld was not repugnant to the commerce clause of the Constitution, because the State in its enactment but exerted its reserved police power to legislate for the protection of the health and safety of the community and to provide against deception or fraud. In support of this theory the court cited from the decisions of this court, to which it had referred, as showing the general rule, and additionally fortified its conclusion by reference to and citations from the opinion of this court in *Plumley* v. *Massachusetts*, (155 U. S. 461.)

All but three of the many propositions embraced in the assignment of errors and urged at bar rest on the contention that the Court of Appeals misconceived the extent of the police power of the State, and therefore erroneously decided that the law of the State of New York which was applied to the case was not repugnant to the commerce clause of the Constitution of the United States. We shall not at any length undertake to review the argument made at bar to sustain this proposition, since its unsoundness will be fully demonstrated by a mere reference to the previous decisions of this court, upon which the court below based its conclusions. Indeed, every contention here urged to show that the law of New York is repugnant to the Constitution of the United States was fully and expressly considered and negatived by the decision of this court in *Plumley* v. *Massachusetts*, *supra*. In that case a law of the State of Massachusetts forbidding the

sale of oleomargarine, which was artificially colored, was applied to a sale in Massachusetts of an original package of that article which had been manufactured in and shipped from the State of Illinois. In the course of a full review of the previous cases relating to the subject it was said (p. 472):

"If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally, affect trade in such products transported from one State to another State. But that circumstances does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as said by this court in *Sherlock* v. *Alling*, (93 U. S. 99, 103): 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'"

Again, it was said (p. 478):

"And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use and eagerly sought by people in every condition of life, are protected by the Constitution in making a sale of it against the will of the State in which it is offered for sale, because of the circumstance that it is an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public."

The assertion that the statute of the State of New York which the court below applied is repugnant to the commerce clause of the Constitution of the United States being thus shown to be devoid of merit, there remains only to be considered the three propositions to which we have previously adverted. We shall briefly consider and dispose of them.

1st. It is insisted that, even although it was in the power of the State of New York to legislate for the prevention of fraud and deception by for-

bidding the sale of the adulterated food products, such prohibition could only operate upon contracts made within or intended to be executed within the State, and as the contract here in controversy was not of such character, therefore the law of the State of New York was erroneously held to control. This proposition is based on the assumption that because the buyers of the coffee were residents of Maryland, therefore the contract must be treated as having been made for the purpose of securing the shipment of the coffee from Rio Janeiro to the residence of the buyers, hence the city of New York was referred to in the contract merely as the port of entry. It is insisted, *per contra*, that this proposition was not relied upon at the trial, nor called to the attention of the Court of Appeals of the State of New York, and should not be now considered, because if it had been raised below it would have been met by proof showing that the buyers, although residents in Maryland, were engaged in carrying on a business for the sale of coffee in New York city. The suggestion that the proposition was not made below is borne out by the fact that it was not referred to by the Court of Appeals of the State of New York or in the several opinions handed down by the Supreme Court of the State of New York during the course of the protracted litigation which the cause has engendered. Be this as it may, however, we think the proposition is devoid of merit. The contract of sale was made in New York; the storage and delivery in the city of New York was therein provided for. It was clearly, therefore, a New York contract and governed by the law of New York.

2d. It is urged that, even although there was power in the State of New York to legislate on the subject of adulteration of food, such legislation ceased to be operative as regards food products imported into the United States through the channels of foreign commerce after the passage of the act of Congress approved August 30, 1890, "providing for the inspection of meats for exportation, prohibiting the importation of adulterated articles of food or drink, and authorizing the President to make proclamation in certain cases." (26 Stat. 414.) The second section of that act, it is insisted, does not exclude from importation adulterated food but simply adulterated food which is mixed with any poisonous or noxious chemical, drug or other ingredient injurious to health, which it is urged was not the case with the coffee in question. The language of the section upon which this contention is based is as follows:

"That it shall be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spiritous or malt liquors, adulterated or mixed with any poisonous or noxious chemical, drug or other ingredient injurious to health."

We think it unnecessary to determine whether the statute lends even color to the proposition, since we think it is clear that its effect, whatever be its import, was not to deprive the State of its police power to legislate

for the benefit of its people in the prevention of deception and fraud, and thus to control sales made within the State of articles so adulterated as to come within the valid prohibitions of the State statute.

3d. In the trial court the plaintiff tendered evidence to demonstrate that there was a demand in some portions of the country for artificially colored coffee, and to the ruling of the court excluding such testimony as irrelevant exception was saved. Although the Court of Appeals, in its opinion, did not make any special reference to the subject, it is insisted that the question was called to its attention, and that in affirming the judgment it in effect sustained the action of the trial court in excluding the testimony, and thereby deprived the plaintiff of rights secured under the Constitution of the United States. The effect of the evidence, it is argued, had it been admitted, would have been to show that coffee artificially colored as a means of fraud and deception was a recognized article of commerce, and therefore the right to deal in it was protected by the commerce clause of the Constitution of the United States, and such dealings could not, therefore, be controlled by the State law. To state the proposition we think is to answer it.

It, moreover, is disposed of by the decisions of this court to which we have previously referred. Besides, the question which the case involved was the right of the sellers to contract for and deliver in the State of New York an article so adulterated and fraudulent as to be within the prohibitions of the law of New York. Further, the proof tending to show that coffee so adulterated and artificially colored as to be the convenient means of accomplishing fraud and deceit was in demand in some places outside of the State of New York, could have no legitimate tendency to cause the adulterated and fradulently deceptive article to become legitimate commerce.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.